No. 10-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MONICA CASTRO, for herself and as Next Friend of R.M.G.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), apply to acts by federal employees that exceed the scope of their statutory or constitutional authority?

2. Even if governmental conduct would otherwise fit within the discretionary function exception, does the law enforcement proviso of the Federal Tort Claims Act, 28 U.S.C. § 2680(h) – which authorizes suits based on an enumerated list of common-law torts if those torts are committed by federal law enforcement officers – nonetheless permit a plaintiff to proceed?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monica Castro, for herself and as next friend of R.M.G., respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-18a) is reported at 608 F.3d 266. The panel decision (Pet. App. 19a-51a) is reported at 560 F.3d 381. The opinion of the district court (Pet. App. 52a-79a) is reported online at 2007 U.S. Dist. LEXIS 9440.

JURISDICTION

The opinion and judgment of the court of appeals on rehearing en banc was filed on June 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

> States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The full text of 28 U.S.C. § 2680 – the exceptions to jurisdiction under the Act – is set out in the appendix. Pet. App. 101a-103a. Section 2680 provides, in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

After fleeing her home in Texas following a domestic dispute, petitioner Monica Castro, a U.S. citizen, sought assistance from U.S. Border Patrol officers in recovering her daughter, petitioner R.M.G., from the baby's father. He was a Mexican citizen illegally in the United States. Border Patrol agents arrested him. But although they knew that R.M.G. was a U.S. citizen, they detained her as well, and refused to release her from immigration detention. Later that same day, over Castro's pleas and despite notice that Castro's lawyer was seeking a court order that would name her the custodian (thereby preventing R.M.G.'s removal from the United States), Government officials transported the baby across the international border. It took Castro three years to reunite with her daughter.

Petitioners sued the United States under the Federal Tort Claims Act for five state-law causes of action. A divided Fifth Circuit, sitting en banc, held that the district court lacked subject-matter jurisdiction because the agents' conduct fell within the discretionary function exception to the Act. 28 U.S.C. § 2680(a). This decision deepens two circuit splits over the nature and operation of this exception.

1. The material facts in this case are not in dispute.[1] In December 2002, petitioner Monica

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[1] The district court dismissed the complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Thus, this Court will "accept all of the factual allegations in [petitioners'] complaint as true," *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991), regardless of whether particular

Castro – a fourth-generation citizen – gave birth in Lubbock, Texas, to a daughter, R.M.G.[2] The baby's father was Omar Gallardo, a Mexican national present illegally in the United States.

Over the next year, Castro and Gallardo's relationship deteriorated. On Friday, November 28, 2003, after several violent arguments, petitioner tried to leave the couple's home with her baby. Gallardo held onto the child and shoved petitioner. Fearing further violence, petitioner left without her daughter. Pet. App. 54a-55a.

Petitioner immediately contacted local authorities seeking their assistance in recovering her baby. But they refused to help because she lacked a court order. *Id.* at 55a.

On Monday, December 1, 2003, petitioner went to the U.S. Border Patrol station in Lubbock. She met with Agent Manuel Sanchez. When she informed Sanchez about the situation, he told her that Gallardo was wanted along with his brothers for questioning regarding a homicide. *Id.* at 83a. Sanchez asked for petitioner's help in locating him. Despite never before having "invited" civilians to enforcement actions, R. 865:141-42,[3] Sanchez told

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"allegations are subject to dispute," *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

[2] Although R.M.G. is also a petitioner in this case, the petition refers to her by her initials to distinguish her from Castro.

[3] References to the Record on Appeal are cited "R. [page number]."

petitioner that if she accompanied the Patrol, agents would question the adults about their citizenship and leave R.M.G. with her, since both she and the child were U.S. citizens. Pet. App. 56a-57a, 83a.

Petitioner, however, feared that Gallardo or his relatives would retaliate against her for assisting the Government. So she told Sanchez that she did not want to attend the raid itself, but would instead watch from nearby. *Id.* at 57a. Sanchez agreed that he would take R.M.G. to the station and telephone petitioner to retrieve her. He indicated that the Government would not allow Gallardo to remove the child from the country. *Id.* at 83a.

Two days later, agents raided petitioner's home, arresting Gallardo and several relatives. They took the group, including R.M.G., to the Lubbock station and placed them in a holding cell. *Id.* at 57a.

Agents did not, however, contact petitioner. Nonetheless, shortly after the raid, she went to the station to request her daughter's release. *Id.* at 84a. After talking to Gallardo, the agents refused. They also refused to allow petitioner, who could hear her baby's cries from the waiting area, to see her child. *Id.* at 85a.

When she learned of the agents' plan to transport the child to Mexico that afternoon along with Gallardo (who was subject to summary deportation based on a prior order of removal, *id.* at 37a), petitioner sought legal assistance. *Id.* at 58a; R. 473:72 to 474:75. She met with attorney Lina Reyes-Trevino, who immediately contacted the Border Patrol. R. 524:16. Agent-in-Charge Greg Kurupas told Reyes-Trevino that unless she obtained a court

order by three p.m., the Government would take the baby to Mexico. *Id.* at 525:17.

Reyes-Trevino prepared a "Suit Affecting Parent-Child Relationship" – the method by which Texas adjudicates control over children, *see* Tex. Family Code §§ 101.001 *et seq.* – and a temporary restraining order to keep the baby from being transported. R. 524:16 to 525:17. She went directly to the local courthouse to obtain the TRO. All the judges were then in session. Both she and her secretary repeatedly telephoned the Border Patrol to update the Government. *Id.* at 525-26. Shortly before three, Reyes-Trevino called Kurupas to ask for more time. She called back a few minutes later to announce that a judge had agreed to hear her, only to be informed, "[T]oo late, I already put them on the bus." *Id.* at 526.[4]

The government van carrying R.M.G., along with Gallardo and other deportable aliens, traveled hundreds of miles to the international border. There, the Government delivered the child, along with the individuals being repatriated, to Mexican authorities.

Once he reached Mexico, Gallardo cut off contact with Castro. Despite written requests, petitioner received no assistance from the Government in locating her child. *See* R. 556-65. Nearly three years

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[4] Federal law permitted postponing removal until the state court had ruled, *see* 8 U.S.C. § 1231(a)(1)(A) (providing for a 90-day removal period), but Kurupas declined to do so to avoid the cost – somewhere between $40 and "over $200 plus," R. 553:117-18 – associated with lodging the baby overnight.

later, Gallardo was arrested after again returning illegally to the United States. He pleaded guilty and agreed to return R.M.G. *See* Pet. App. 59a-60a; R. 422-24.[5] On December 1, 2006, Castro and her now four year-old child were reunited. Pet. App. 60a.

2. On June 1, 2005, while R.M.G. was still missing, petitioner filed administrative claims, both in her individual capacity and as next friend of her daughter, with the Department of Homeland Security, Customs and Border Protection. The Government neither approved nor denied the claims within the next six months. Pet. App. 81a.

Having thus exhausted her administrative remedies, *see* 28 U.S.C. § 2675(a), Castro filed this suit, naming the United States as the sole defendant, in the United States District Court for the Southern District of Texas. The complaint invoked the Federal Tort Claims Act (FTCA), alleged claims under Texas law of gross negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault, and sought damages on behalf of both Castro and her daughter. *See* Pet. App. 80a, 89a-95a.[6]

The Government moved to dismiss for lack of subject-matter jurisdiction. It claimed that all the agents' actions were shielded by the discretionary

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[5] These pages are unpaginated in the court of appeals record.

[6] Petitioners' constitutional claims and claims for declaratory and injunctive relief were dismissed and are not before this Court.

function exception to the FTCA contained in 28 U.S.C. § 2680(a), which provides that the Act does not waive the Government's sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." Petitioners opposed the motion, arguing that the exception was inapplicable because the agents had acted outside the scope of their statutory and constitutional authority.

The district court agreed with the Government. It recognized that the FTCA provides a general waiver of the Government's sovereign immunity. Pet. App. 64a. It also recognized that petitioners' claims for assault, abuse of process and false imprisonment fell within the "law enforcement proviso" of Section 2680(h), which specifically authorizes jurisdiction over such claims when they involve "acts or omissions of investigative or law enforcement officers of the United States Government." Pet. App. 65a n.9 (quoting § 2680(h) and stating that Border Patrol officers "are federal law enforcement officers for purposes of the [FTCA].")

Nonetheless, the district court concluded that all of petitioners' claims were barred by the discretionary function exception. It based its analysis on a two-prong test articulated by the Fifth Circuit in *Garza v. United States*, 161 Fed. Appx. 341 (5th Cir. 2005), which was in turn ostensibly derived from this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). The first prong of the test

> requires that the challenged governmental action be the product of judgment or choice.

> Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however, the governmental action is considered discretionary and the first prong is satisfied.

Pet. App. 66a-67a (quoting *Garza*, 161 Fed. Appx. at 344).

The district court found that the decision not to release R.M.G. from immigration detention was the product of "judgment or choice." Pet. App. 68a. The district court saw "no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation." *Id.* at 70a & n.11. Thus, the agents' decision to keep the baby in the holding cell and transport her along with Gallardo to Mexico was discretionary.

The court then concluded that the Government had satisfied the second prong of the *Garza* test, which asks whether the choice at issue was "grounded in social, economic, or political policy," Pet. App. 67a (quoting *Garza*, 161 Fed. Appx. at 344). It found that the choice here "involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." Pet. App. 75a.

3. On appeal, a divided panel of the Fifth Circuit reversed. *Id.* at 39a. The panel agreed with the district court that petitioners' assault, false

imprisonment, and abuse of process claims fell within the law enforcement proviso of Section 2680(h), and thus were not barred by the intentional tort exception to the FTCA. *Id.* at 31a. It then held that none of petitioners' claims was barred by the discretionary function exception.

Acknowledging that the Seventh Circuit had permitted invocation of the exception even with respect to "constitutionally repugnant" conduct in *Kiiskila v. United States,* 466 F.2d 626 (7th Cir. 1972), Pet. App. 33a, the panel instead aligned itself with the "majority of other circuits" that had held the exception unavailable when government agents "exceed the scope of their authority as designated by statute or the Constitution." *Id.* at 32a-33a (citing cases from the First, Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits).

The panel then held that petitioners had alleged facts sufficient to establish that in the course of committing torts under Texas law – the predicate for bringing suit under the FTCA – the agents' acts "went beyond the scope of their authority" under federal immigration law and "the constitution" (specifically, the Fourth and Fifth Amendments). Pet. App. 34a-35a. The panel pointed to the "quite limited" power of Border Patrol agents "to detain U.S. citizens." *Id.* at 36a. Because the agents "concede[d] that they knew R.M.G. was a U.S. citizen," *id.* at 38a, they lacked any authority for detaining her. Thus, the panel remanded the case for further proceedings, emphasizing that its holding had been "limited to the jurisdictional question presented on appeal." *Id.* at 39a.

Judge Smith dissented. While this Court had held in *Gaubert* that violations of "a federal statute, regulation, or policy" would defeat the discretionary function exception, 499 U.S. at 322, Judge Smith postulated that the Court's "omission" of the Constitution from this list meant that the exception remained available to shield unconstitutional conduct. Pet. App. 42a. He claimed further support for this position from the Fifth Circuit's decision in *Santos v. United States*, 2006 U.S. App. LEXIS 10261 (5th Cir. 2006), which had upheld application of the exception to allegedly unconstitutional conduct. *Id.* at *9-*10. Because "the government has not waived its immunity with regard to constitutional torts," *id.* at *9 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)), plaintiffs should not be permitted to overcome the discretionary function exception by alleging that the conduct at issue violated the Constitution as well as state law. *See* Pet. App. 42a-46a.

In any event, Judge Smith regarded the agents' actions as permissible in light of Gallardo's physical possession of R.M.G. at the time he was arrested and his desire to keep her with him when he was deported. *Id.* at 46a-50a.

4. The Government moved for rehearing en banc on the question whether an FTCA plaintiff can defeat the discretionary function exception by alleging that governmental agents acted in excess of their constitutional authority. *See* Gov't Pet. for Rehearing En Banc 1. The court of appeals granted the Government's petition. A divided court then affirmed the judgment of the district court, holding that "the discretionary function exception applies" to all of petitioners' claims. Pet. App. 2a. In its two-

page per curiam opinion, the en banc majority did not dispute petitioners' allegations that the agents had acted beyond their statutory authority and in violation of the Constitution. Instead, the en banc majority noted only that no "statute, regulation or policy" directly "mandated" that the Border Patrol take a specific action; therefore, the agents' acts were discretionary. *Id.* at 3a (quoting the district court). It thus "affirm[ed], essentially for the reasons given by the district court, the dismissal of the FTCA claims for want of jurisdiction." *Id.*

Judges Stewart, DeMoss, and Dennis each dissented. Judge Stewart's dissent, joined by Judge DeMoss, reiterated the points he had made in the panel opinion (which Judge DeMoss had joined). In particular, he emphasized that petitioners' complaint "plausibly alleged that the Border Patrol exceeded the scope of its authority under the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.*, and the Fourth and Fifth Amendments." Pet. App. 7a. In his view, actions taken beyond statutory authority or in violation of constitutional prohibitions could not, as a matter of law, fall within the discretionary function exception of Section 2680(a). Pet. App. 8a (citing *Berkovitz v. United States*, 486 U.S. 531, 539 (1988)).

Judge DeMoss filed a separate dissent. He agreed that the discretionary function exception would not cover any of petitioners' claims "[i]f the Border Patrol agents exceeded the scope of their authority." Pet. App. 4a. But "even if the Border Patrol agents acted within the scope of their authority and the discretionary function exception applied," subject-matter jurisdiction existed over

petitioners' claims for false imprisonment, abuse of process, and assault because "[t]he law enforcement proviso [of Section 2680(h)] waives sovereign immunity for those claims." *Id.* In reaching this conclusion, he relied on the Eleventh Circuit's recent decision in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009).

Judge Dennis agreed that the law enforcement proviso of Section 2680(h) conferred subject-matter jurisdiction over petitioners' claims for false imprisonment, abuse of process, and assault. Pet. App. 15a. But in his view petitioners had failed to state a claim for false imprisonment under Texas law. *Id.* at 16a. Moreover, although Judge Dennis also agreed that, as a matter of law, unconstitutional conduct cannot be shielded by the discretionary function exception, *id.* at 16a-17a, he believed that the alleged conduct here was not unconstitutional because it was permissible for Government agents to leave R.M.G. with Gallardo. *See id.* at 17a-18a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The discretionary function exception to the Government's waiver of sovereign immunity in the Federal Tort Claims Act, found at 28 U.S.C. § 2680(a), is "[u]ndoubtedly one of the [Act's] most important and frequently litigated provisions." Charles Alan Wright et al., 14 Federal Practice and Procedure § 3658.1 (3d ed. 1998 & 2010 Supp.). "Unfortunately, it is unclear exactly what falls within the scope of this provision, despite an immense amount of precedent that has developed on the

subject." *Id.* This case presents two important, recurring, and interrelated, questions of law concerning that exception, providing this Court with an opportunity to bring order to this muddled field.

The first is the availability of the exception in cases where conduct by a Government employee not only gives rise to a tort claim under state law – the predicate for liability under the FTCA – but also falls outside that employee's statutory or constitutional authority. This Court's decisions suggest, and the overwhelming majority of circuits have held, that the exception is unavailable in such cases. The Fifth Circuit, at the Government's urging, has issued an en banc decision that conflicts with this consensus, solidifying a circuit split on the issue.

The second question concerns the relationship between the discretionary function exception and the law enforcement proviso of Section 2680(h), which deals with suits arising out of conduct by law enforcement officers. The proviso affirmatively authorizes suits based on an enumerated list of common-law torts for which there would otherwise be no jurisdiction. The courts of appeals are splintered over whether, and if so, how, the discretionary function exception applies to these cases.

I. Certiorari Should Be Granted To Confirm That The Discretionary Function Exception Does Not Apply To *Ultra Vires* Or Unconstitutional Acts.

The "central purpose" of the Federal Tort Claims Act was to "waiv[e] the Government's immunity from suit in sweeping language." *Dolan v. United States*

Postal Service, 546 U.S. 481, 492 (2006) (internal quotation marks omitted)). The exceptions to jurisdiction in Section 2680 must be construed in light of that purpose. *Id.*

The discretionary function exception of Section 2680(a) deprives courts of jurisdiction over claims that involve "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This Court has refused to apply that exception to conduct that violates statutory mandates. But it has not expressly addressed the applicability of the exception to *ultra vires* conduct – that is, conduct that exceeds the scope of an employee's statutory or constitutional authority but does not contravene some affirmative legal duty.

Seven courts of appeals have reached this question, and have held that the exception does not apply. In conflict with those circuits, and aligning itself with only the Seventh Circuit, the Fifth Circuit's en banc decision extends the exception to conduct that exceeds an employee's statutory authority or violates the Constitution, so long as it does not fail to follow a statutory mandate. This holding warrants review and reversal.

A. The Decision In This Case Is Inconsistent With This Court's Decisions And Conflicts With The Decisions Of Seven Courts of Appeals.

The Fifth Circuit en banc majority did not dispute petitioners' allegation that Government

agents exceeded their statutory authority by keeping R.M.G. in immigration detention. Nor did the court dispute that the agents violated both petitioners' constitutional rights. Instead, it held that the Government was shielded from liability by the discretionary function exception simply because "the Border Patrol Agents' conduct in the situation" was not affirmatively "mandated" by federal law. Pet. App. 3a; *see also* Pet. App. 70a & n.11 (district court decision holding that exception applied because there was "no statute, regulation, or policy that directed the Border Control Agents to take a certain course of action"). This holding is inconsistent with this Court's decisions and conflicts with the rule in seven circuits, which have held that the exception does not cover conduct that is *ultra vires*.

1. In *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991), this Court clearly limited the discretionary function exception of Section 2680(a) to choices made within the bounds of federal law. In *Berkovitz*, it emphasized that the "range of choice" available to a Government employee is fixed "by federal policy and law." *Id.* at 538. Thus, actions outside that range cannot qualify for the exception, which only "insulates the Government from liability if the action challenged in the case involves the *permissible* exercise of policy judgment." *Id.* at 537 (emphasis added). In *Gaubert*, the Court reaffirmed that conduct qualifies for the exception only when it involves choice or "judgment as to which of a range of *permissible* courses is the wisest." 499 U.S. at 325 (emphasis added).

2. Consistent with this Court's approach, seven courts of appeals have held that the discretionary function exception does not shield "actions that are unauthorized because they are [1] unconstitutional, [2] proscribed by statute, or [3] exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254-255 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004). Thus, earlier this year, the First Circuit upheld a $100 million judgment against the United States on an intentional infliction of emotional distress claim arising out of FBI agents' involvement in framing several men for murder. *Limone v. United States*, 579 F.3d 79, 82-83 (2010). The court cited the panel opinion in this case for the conclusion that the exception does not "shield conduct that transgresses the Constitution." *Id.* at 101 (citing *Castro v. United States,* 560 F.3d 381, 389 (5th Cir. 2009)). Proof that Government agents had "participated in framing [the plaintiffs] and had withheld exculpatory evidence to cover up their malefactions stated a clear violation of due process." *Id.* at 102.

The First Circuit is joined by the Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits. In *Myers & Myers Inc. v. U.S.P.S.*, 527 F.2d 1252, 1261 (2d Cir. 1975), the Second Circuit found subject-matter jurisdiction over a case where the complaint alleged facts that would establish not only negligence under state law but also a violation of due process, reasoning that "a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority." Similarly, in *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), the court upheld liability with respect to a

common-law invasion of privacy claim arising from the conduct of CIA agents who opened and read the plaintiffs' mail. "[A] discretionary function can only be one within the scope of authority of an agency or an official, as delegated by statute, regulation, or jurisdictional grant," and the CIA's charter gave it "no authority to gather intelligence on domestic matters." *Id.* at 329.

The Third Circuit held in *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116 (3d Cir), *cert. denied*, 487 U.S. 1235 (1988), that "conduct cannot be discretionary if it violates the Constitution." *Id.* at 120. Accordingly in *Prisco v. Talty*, 993 F.2d 21 (3d Cir. 1993), the court held that the exception could not bar a suit for interference with state-created parental rights caused by the Government's permitting the other parent to take the child into the Witness Protection Program, because infringement of family relationships would give rise to a substantive due process claim. *Id.* at 26 n.14. *See also Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) (quoting *U.S. Fidelity*).

In *Raz v. United States*, 343 F.3d 945 (8th Cir. 2003) (per curiam), the Eighth Circuit found subject-matter jurisdiction over a suit for invasion of privacy and intentional infliction of emotional distress caused by FBI surveillance and harassment, holding that the agents' actions fell "outside" the exception because the plaintiff "alleged they were conducted in violation of his First and Fourth Amendment rights." *Id.* at 948. *See also Ruffalo v. United States*, 590 F. Supp. 706, 711-13 (W.D. Mo. 1984) (recognizing a claim for interference with state-law parental rights when law enforcement agents took plaintiff's child, along with

the child's father, into the Witness Protection Program).

The Ninth Circuit has taken the same approach. In *Nurse v. United States,* 226 F.3d 996 (9th Cir. 2000), it found jurisdiction over false imprisonment and negligence claims, because the plaintiff alleged conduct that was both tortious and discriminatory in violation of the Fifth Amendment. *See id.* at 1002-03.

Finally, the D.C. Circuit has held that a decision "cannot be shielded from liability" under the exception "if the decisionmaker is acting without actual authority." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) (permitting a negligence claim to proceed seeking compensation for property damage attributable to FBI conduct during a disturbance on an Indian reservation when the FBI had no jurisdiction to act).

3. By contrast, the Fifth Circuit does not consider whether the conduct giving rise to the state-law tort claim is unconstitutional or exceeds the scope of an official's authority. Instead, it has adopted a rule that looks only at whether federal law "mandates a specific course of action." *Garza v. United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005); Pet. App. 66a-67a. "When no mandate exists" the employee's action "is considered discretionary." *Id.* Thus, the Fifth Circuit applies the discretionary function exception without regard to a plaintiff's allegations that, although no "mandate" requires a "specific course of action," the course that was actually chosen exceeds the official's scope of authority or violates the Constitution. *See also*

Santos v. United States, 2006 U.S. App. LEXIS 10261 at *9 (5th Cir. 2006) (per curiam) (rejecting plaintiff's "attempt to save his claims from the discretionary function exception" by arguing that "the acts of which he complains not only constitute negligence, but also violate the Eighth Amendment"). In contrast to the seven circuits described above, such allegations are irrelevant in the Fifth Circuit.[7]

The Fifth Circuit's rule that the discretionary function exception can shield conduct that is unconstitutional is embraced by only one other court of appeals. *See Kiiskila v. United States,* 466 F.2d 626, 627-28 (7th Cir. 1972) (per curiam) (holding that even though a base commander's decision to exclude a civilian employee from the base was "constitutionally repugnant," because it violated the First Amendment, it fell within the exception).

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[7] Astonishingly, a Fifth Circuit panel opinion recently suggested that that court "has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception," *Spotts v. United States*, 2010 WL 2991759 at *6 (5th Cir. July 30, 2010). This assertion misconstrues the en banc court's decision in this case, which vacated the panel decision and embraced the district court's sole reliance on the absence of a direct mandate. In so doing, the Fifth Circuit did not dispute Castro's claims of *ultra vires* and unconstitutional acts; it simply applied the discretionary function exception anyway. *See also Santos v. United States*, 2006 U.S. App. LEXIS 10261 at *9-*10 (upholding application of the exception to allegedly unconstitutional conduct). Within the Fifth Circuit, there is no doubt that allegations of unconstitutional conduct are insufficient to defeat the exception.

B. The Discretionary Function Exception Does Not Apply To This Case.

1. The Fifth Circuit is wrong to treat Government conduct as discretionary within the meaning of Section 2680(a) when it is *ultra vires*. This Court has squarely held that the discretionary function exception does not apply when federal employees violate a federal "statute, regulation, or policy" in carrying out their duties. *See Gaubert*, 499 U.S. at 322, 324-26; *Berkovitz*, 486 U.S. at 536, 544. The Fifth Circuit has provided no reason to adopt a different rule with respect to the Constitution, the Supreme Law of the Land.[8] Indeed, this Court long

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[8] The suggestion floated by one member of the en banc majority – who hypothesized that this Court deliberately "omitted" the Constitution from its "list of sources" that can "nullif[y] the discretionary function exception," Pet. App. 42a – makes no sense. Equally unpersuasive is his suggestion (echoed by the Government in its brief before the en banc court) that the Government's failure to waive sovereign immunity for constitutional claims justifies extending the discretionary function exception to unconstitutional conduct. *See* Pet. App. 42a-46a. Petitioners' *causes of action* do not arise under the Constitution. Rather, they arise under state law, and the Government has affirmatively waived its immunity. 28 U.S.C. § 1346(b)(1).

Moreover, everyone agrees that if Government employees make choices that give rise to state-law claims and those choices also violate federal *statutes* or *regulations*, the discretionary function exception is unavailable. *See supra* 16-20; *see also Spotts*, 2010 WL 2991759 at *5. This is true regardless of whether the Government would consent to suit based directly on the violated statute or regulation. Neither the Government nor Judge Smith has provided any reason for thinking a different result should obtain if Government employees made choices that

ago recognized that governments have "no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

The fact that there may be several potential permissible courses of conduct in a given situation – and that the Government may be entitled to invoke the discretionary function exception when choosing from among that range – does not undercut the fact that conduct prohibited by the Constitution lies outside the range and is therefore unprotected. *See Berkovitz*, 486 U.S. at 537 (the exception protects choices within a "permissible" range); *Gaubert*, 499 U.S. at 325 (same).

The Fifth Circuit's failure to consider whether Government employees have acted in excess of their statutory authority suffers as well from an additional flaw. Almost by definition, when Government officials act outside the scope of their statutory authorization, there will not be a "mandate" directing them to take a "specific course of action," Pet. App. 66a-67a (internal quotations omitted), in a sphere they should not have entered in the first place. But under the Fifth Circuit's rule, the further outside the scope of their authority they act, the more likely their acts are to be considered discretionary.[9]

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give rise to state-law claims and those choices also violate the Constitution. Indeed, such a differentiation seems perverse.

[9] Nor will this anomaly be cured by the second prong of the Fifth Circuit's test. That prong asks "whether the judgment is grounded in social, economic, or political policy. If the judgment of the governmental official is based on any of these policy

2. This case provides an ideal vehicle for clarifying the scope of the discretionary function exception. There are no procedural obstacles to reaching the question presented. Moreover, the question is outcome-determinative. If the Fifth Circuit had applied the legal standard employed by seven other circuits, it would have found subject-matter jurisdiction here because the facts petitioners alleged plausibly establish that the officers acted outside of their statutory and constitutional authority.

a. *Statutory authority.* The Non-Detention Act, 18 U.S.C. § 4001(a), provides that "[n]o citizen" shall be "detained by the United States except pursuant to an Act of Congress." The Border Patrol's authority to detain U.S. citizens is sharply circumscribed. As Judge Stewart's panel opinion and en banc dissent explain, federal law authorizes the Patrol to detain citizens only in limited circumstances not present here. Pet. App. 13a-14a, 35a-38a; *see* 8 U.S.C. § 1357(a) (permitting detention only in connection with certain crimes allegedly committed by the citizen).

In recognition of this circumscribed authority, the Government recently acknowledged that it is a violation of federal policy to "knowingly hold a U.S. citizen child in detention." Department of Homeland

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considerations, then the discretionary function exemption applies and the claim is barred." *Garza*, 161 Fed. Appx. at 344 (internal citation omitted). As the decision in this case shows, the Fifth Circuit answers that question without asking whether federal law authorized *this* official or agency to make policy choices in a particular area.

Security, Office of Inspector General, Removals Involving Illegal Alien Parents of United States Citizen Children 11 (OIG-09-15 Jan. 2009):[10]

> Known U.S. citizens are not placed in immigration detention. ICE officials said that if CBP [Customs and Border Protection] or ICE identifies the child as a U.S. citizen, the child is released to the parent's designated custodian or to Child Protective Services.

Id.

In light of the scope of their authority, the agents in this case had several permissible options: they could have released R.M.G. to her mother; they could have released her to an adult designated by Gallardo; or they could have released her to Child Protective Services. What they had no jurisdiction to do was to continue holding her in immigration detention. Their decision to do so was *ultra vires*. Put another way, the fact that no federal law told them precisely what to do with R.M.G. in the sense of identifying a specific, mandatory course of action does not change the fact that the path they chose lay outside the permissible range.

Any suggestion that somehow the Government was not detaining R.M.G. will not wash. The Government locked the baby in a holding cell and denied access to her mother. Pet. App. 84a. When

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[10] The OIG Report was issued while this case was under submission and was brought to the attention of the en banc court. *See* En Banc C.A. Br. of Appellant Castro at 10-11, 39-40 (quoting the Report).

petitioner invoked the child's right to be released from immigration detention, the agents continued to keep her there. The Government then transported the infant hundreds of miles in a locked official vehicle to which the public had no access.

The fact that Gallardo was also, and undeniably, in immigration custody is irrelevant. Children are not barnacles attached to their parents. *Cf. Franz v. United States*, 707 F.2d 582, 590-94 (D.C. Cir. 1983) (finding the Government amenable to suit by a father who claimed deprivation of his state-law and federal constitutional rights to access to his children when the Government permitted his ex-wife to take them with her into the Witness Protection Program). Because the agents acted *ultra vires*, their acts are not shielded by the discretionary function exception.[11]

Moreover, because the courts below focused only on whether federal law provided a mandate for a "specific" course of action, they ignored the fact that the agents' conduct undermined well-established federal policy by enabling Gallardo to remove R.M.G. from the country. The International Parental

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[11] Still less did the Border Patrol act within its statutory authorization when it removed R.M.G. to Mexico. For nearly ninety years, it has been black-letter law that Government agents have no power to remove U.S. citizens. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (finding that such authorization "exists only if the person arrested is an alien"). In fact, the official "Record of Persons and Property Transferred" prepared by the Government omitted R.M.G. from the list of persons being turned over to Mexican authorities, because the officers recognized that she was a U.S. citizen over whom they had no authority. R. 533:49 to 534:55.

Kidnapping Crime Act, 18 U.S.C. § 1204(a) forbids removing a child from the United States "with intent to obstruct the lawful exercise of parental rights." The Act applies to parents as well as strangers. Gallardo's actions showed his intention to deny Castro the parental rights she possessed under Texas law. The Government not only allowed him to take the child with him to Mexico, despite knowing that Castro was pursuing a judicial order to keep her daughter in the United States under her custody, but it then failed to obtain an address or any other information that would have enabled petitioner to protect her rights. In doing so, the agents also undermined the federal policy embodied in the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99-11, to which the United States is a signatory. That treaty expresses a strong intention that child custody issues be adjudicated in the country of the child's habitual residence – here, the United States. *See Abbott v. Abbott*, 130 S. Ct. 1983 (2010). By whisking R.M.G. out of the country within hours of seizing her, the Border Patrol undermined that strong federal preference.

b. *Constitutional authority.* The factual allegations in petitioners' complaint also establish constitutional violations. To be clear: those violations are not the bases for petitioners' claims under the FTCA; Texas law is. But unconstitutional conduct defeats the discretionary function exception. *See supra* 21-22.

Petitioners have alleged facts that establish a violation of R.M.G.'s Fourth Amendment right to be free from an unreasonable seizure. To be sure, the

Government acted reasonably in taking R.M.G. to the stationhouse; no one suggests the agents should have left a one year-old child alone. *Cf.* Tex. Fam. Code § 261.001(4)(A) (defining neglect to include leaving a child in a risky situation without arranging "necessary care"). But because the agents knew R.M.G. was a U.S. citizen, they had no authority to hold her in immigration detention. Once her mother, petitioner Castro, invoked R.M.G.'s right to be released, Gallardo's wishes could not trump R.M.G.'s constitutional rights. *Cf. Georgia v. Randolph*, 547 U.S. 103 (2006) (if either resident of a house refuses consent to a search, the Government cannot search).

Second, petitioners' factual allegations establish a violation of R.M.G.'s Fifth Amendment "constitutional right to remain" in the United States. *Afroyim v. Rusk,* 387 U.S. 253, 268 (1967). "To deport one who . . . claims to be a citizen, obviously deprives him of liberty" and "may result also in loss . . . of all that makes life worth living." *Ng Fung Ho,* 259 U.S. at 284. Still more is this true when the Government *knows* that the person being transported out of the country is a citizen, particularly an infant citizen who cannot speak for herself but whose mother is seeking a court order that would prevent her removal.

Third, petitioners' factual allegations establish a violation of their Fifth Amendment substantive and procedural due process rights with respect to familial relationships. The interest of parents "in the care, custody, and control of their [children] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65

(2000). The rights of children to the love, care, and guidance of their families are equally fundamental.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court recognized that even in cases of parental neglect, parents must be given due process before they are stripped of "the rights ever to visit, communicate with, or regain custody of the child." *Id.* at 749. In this case, by contrast, the Border Patrol affirmatively undermined petitioners' constitutional rights by shoving R.M.G. on a bus bound for the border within hours of seizing her and in full knowledge that its actions would undercut Castro's invocation of procedures that would preserve her parental rights. This unconstitutional conduct cannot fall within the discretionary function exception.

II. Certiorari Should Be Granted To Decide The Applicability Of The Discretionary Function Exception To Claims That Fall Within The Law Enforcement Proviso.

As the Fourth Circuit noted in *Medina v. United States,* 259 F.3d 220, 224 (4th Cir. 2001), the federal courts of appeals have "struggled" in deciding the "unsettled" question "whether and how to apply the [discretionary function] exception in cases brought under the intentional tort proviso found in § 2680(h)." This struggle has not produced consensus. To the contrary, the courts of appeals are not just divided; they are splintered. This Court's intervention is required.

A. The Courts Of Appeals Have Adopted Wildly Different Approaches To Reconciling The Law Enforcement Proviso And The Discretionary Function Exception.

1. The positions taken by courts of appeals with respect to the relationship between the law enforcement proviso and the discretionary function exception run the gamut. The rule in the Eleventh Circuit is straightforward: "[S]overeign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256-57 (11th Cir. 2009). "[I]f a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event." *Id.* at 1257. In a false arrest, false imprisonment, and malicious prosecution case based on the DEA's investigation of the plaintiff's medical practice, the court rejected the Government's claim that the discretionary function exception applied because agents made a series of judgments about how to conduct the investigation. Instead, it held that "to the extent of any overlap and conflict between [the law enforcement] proviso and subsection (a), the proviso wins." 556 F.3d at 1252-53. It based that conclusion on "[t]wo fundamental canons of statutory construction, as well as the clear Congressional purpose behind the § 2680(h) proviso." *Id.* at 1252. First, Section 2680(h), "which applies only to six specified claims arising from acts of two specified types of government officers, is more specific than the discretionary function exception in § 2680(a)," and "a

specific statutory provision trumps a general one." 556 F.3d at 1253. Second, Section 2680(h) was amended after the enactment of Section 2680(a), and "[w]hen subsections battle, the contest goes to the younger one." 556 F.3d at 1253.

The Eleventh Circuit found further support for its position in the legislative history of the 1974 amendment that had added the law enforcement proviso to Section 2680(h). *See id.* at 1253-56. In light of the text and purpose, the court saw no justification for "rewriting the words 'any claim' in the proviso to mean only claims based on the performance of non-discretionary functions." *Id.* at 1256.

The Eleventh Circuit described "five other circuits" as refusing to adopt its categorical approach. See *id.* at 1257 (citing cases).[12] But it believed that those courts had failed to apply the appropriate canons of statutory construction and had not "com[e] to grips with the clear congressional purpose behind the enactment of the proviso to subsection (h)." *Id.*

The Second Circuit's approach in *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982), also relied on congressional purpose to hold that the discretionary function exception would not control cases falling within the law enforcement proviso. The underlying

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[12] It thought, however, that its approach was consistent with that taken by the Fifth Circuit. *See Nguyen*, 556 F.3d at 1257 (citing *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987). *But see infra* 33-34 (describing the Fifth Circuit's current position).

claim – for false imprisonment – arose from immigration officials' decision to detain the plaintiff in the mistaken belief that he was not a U.S. citizen. Applying the discretionary function exception to law enforcement conduct, which often involves "competing considerations," would "jeopardize a primary purpose for enacting § 2680(h)." 671 F.2d at 1234-35. Because "the basically mechanical duty" of deciding whether an individual satisfied the standards for entry into the U.S was less complex than the search-and-seizure related conduct that had prompted enactment of Section 2680(h), "Caban's seems an a fortiori case for allowing suit." *Id.*

2. The District of Columbia adopted the opposite categorical rule in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). That case involved a gross negligence and malice claim by a former Acting Director of the FBI with respect to how the Justice Department had investigated him.

The D.C. Circuit affirmed dismissal of the suit, squarely rejecting Gray's claim that the discretionary function exception did not apply to suits "authorized by the 'investigative or law enforcement officer' proviso of section 2680(h)." 712 F.2d at 507. It saw the "plain language" of Section 2680(a) as "unambiguous" in making "the FTCA's general waiver of sovereign immunity . . . inapplicable to '*any* claim' based on a discretionary function." *Id.* Thus, it held that plaintiff "must clear the 'discretionary function' hurdle *and* satisfy the 'investigative or law enforcement officer' limitation to sustain" a claim under the FTCA. *Id.* at 508.

The Fourth Circuit adopted the D.C. Circuit's rule in *Medina*, *supra*. Relying on *Caban*, the court acknowledged that INS agents fit within Section 2680(h). But it sua sponte invoked the discretionary function exception to hold that Medina's claims were barred. 259 F.3d at 224. *See also Welch v. United States*, 409 F.3d 646, 651-52 (4th Cir. 2005).

The Ninth Circuit has also aligned itself with the D.C. Circuit. *See Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995) (holding that when there is "interplay" between the law enforcement proviso and the exceptions contained in the remainder of Section 2680, the exceptions control, despite recognizing that this rule would "effectively ba[r] any remedy" for some of the claims authorized by the proviso). While pre-*Gaubert* Ninth Circuit decisions had suggested that the discretionary function exception might not apply to conduct by line-level officers, *see, e.g., Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987); *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983), courts within the circuit now apply the discretionary function exception to cases falling within the law enforcement proviso. *See, e.g., Casillas v. United States*, 2009 U.S. Dist. LEXIS 25662, at *56-57 (D. Ariz. 2009).

3. The Third Circuit, in *Pooler v. United States*, 787 F.2d 868 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986), attempts to reconcile the discretionary function exception and the law enforcement proviso by holding that the proviso authorizes suits for the list of torts enumerated in Section 2680(h) only when those torts are committed during the course of a search, a seizure, or an arrest. *Id.* at 872. Thus,

although the Government employee in that case was a law enforcement officer, the proviso did not apply because the allegedly tortious conduct involved investigative methods and filing an unfounded complaint with state authorities.

The Seventh Circuit has in turn squarely rejected the Third Circuit's approach, viewing it as "unduly narrow and lacking any principled underpinning," *Reynolds v. United States*, 549 F.3d 1108, 1114 (7th Cir. 2008)(citation omitted).

4. In this case, the Fifth Circuit has aligned itself with the strongest version of the D.C. Circuit's position. The district court recognized that the "law enforcement proviso of 28 U.S.C. § 2680(h) applies to Plaintiffs' assault, abuse of process and false imprisonment claims." Pet. App. 65a n.9. Nevertheless, the court proceeded to apply the discretionary function exception without taking account of the law enforcement proviso in any way.

In the en banc proceedings, petitioners pointed to the Eleventh Circuit's decision in *Nguyen*, which had been issued two weeks prior to the panel decision. *See* Appellants' En Banc C.A. Brief at 7, 25. They further explained that *Nguyen* was in accord with an earlier Fifth Circuit opinion in *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987), which had declined to apply the discretionary function exception to claims authorized by the law enforcement proviso.

Nevertheless, and over the strong dissent of Judges DeMoss and Dennis, who invoked *Nguyen* and *Sutton*, the per curiam majority adopted the district court's discretionary function analysis

wholesale, Pet. App. 3a, without addressing the salience of Section 2680(h).

B. The Discretionary Function Exception Does Not Strip Federal Courts Of Subject Matter Jurisdiction Over Claims That Fall Within The Law Enforcement Proviso.

The Eleventh Circuit has adopted the correct rule: Federal courts have subject matter jurisdiction over cases within the law enforcement proviso even if law enforcement agents were "performing a "discretionary function" within the meaning of Section 2680(a).

1. Straightforward principles of statutory construction require this result. First, the language of Section 2680(h) is categorical. It provides that "with regard to acts or omissions" by law enforcement officers, 28 U.S.C. § 1346(b), which confers subject-matter jurisdiction on the federal district courts, "*shall* apply to *any* claim arising. . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" (emphasis added). It does not distinguish between ministerial and discretionary acts.

Second, as this Court reiterated last Term, a "specific provision" in a statute "controls one[s] of more general application." *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *Gozlon-Peretz v. United States,* 498 U.S. 395, 407 (1991)). The law enforcement proviso of Section 2680(h) pinpoints an enumerated list of torts committed by an identified group of government employees. It is thus far more specific than the discretionary function exception.

See Nguyen, 556 F.3d at 1253. Moreover, the fact that the law enforcement proviso was passed later in time reinforces the conclusion that it should control.

2. Applying the discretionary function exception to cases that fall within the law enforcement proviso produces perverse results. This Court has recognized our Nation's "well established tradition of police discretion." *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760 (2005). There is generally a good deal of "room for choice," *Gaubert*, 499 U.S. at 324, in deciding whether and how to conduct an investigation, engage in a search, or seize an individual. If courts were to apply the discretionary function exception to law enforcement personnel, the discretionary function exception would swallow up the law enforcement proviso.[13]

It is no answer, given the Fifth and Seventh Circuits' willingness to extend the discretionary function exception to unconstitutional conduct, *see supra* 19-21, to say that the proviso would retain meaning in cases where law enforcement officials engage in conduct that is also unconstitutional Absent a reversal by this Court, even

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[13] Prior to *Gaubert*, several courts tried to harmonize the two provisions by suggesting that law enforcement officers were "operational" actors whose work simply did not involve exercises of discretion. *See, e.g.*, *Garcia*, 826 F.2d at 809; *Pooler*, 787 F.2d at 872. But *Gaubert* decisively held that the discretionary function exception "is not confined to the policy or planning level," but can reach "operational" conduct as well. 499 U.S. at 325.

unconstitutional conduct would be shielded in those two circuits by the discretionary function exception.

3. In any case, limiting plaintiffs' ability to bring suit under section 2680(h) only to instances where law enforcement conduct is unconstitutional as well as tortious would defy Congress's clearly expressed intent. The 1974 Senate Report accompanying addition of the law enforcement proviso to Section 2680(h) explained that the proviso

> should not be viewed as limited to constitutional tort situations but would apply to *any* case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 2789, 2791) (emphasis added). Congress thus expressly acquiesced to suit even in cases that would otherwise fall within the discretionary function exception. *See also* Jack Boger, Mark Gitenstein, & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497, 515 (1976) (reviewing the legislative history of the proviso at length and explaining that the proponents were "clearly insistent" that the FTCA be available even in cases where plaintiffs could not bring *Bivens* actions).

The most sensible reading of Section 2680(h) recognizes that the law enforcement proviso creates subject-matter jurisdiction over the enumerated list of state-law claims when they arise in the course of federal law enforcement activity.

4. Finally, this case provides an appropriate vehicle for resolving this recurring question of federal law in light of the increasing disarray demonstrated by the recent decisions in *Nguyen*, *Reynolds*, and this case. There is no question that petitioners' complaint alleged causes of action that fall within the law enforcement proviso. Pet. App. 92a-95a (alleging false imprisonment, abuse of process, and assault, each of which is enumerated in Section 2680(h)). Nor is there any question that the Government employees involved were law enforcement officers engaged in law enforcement activity at all times relevant to this suit. Pet. App. 65a n.9; *see Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that Border Patrol agents are law enforcement officers for purposes of Section 2680(c)); *cf. Medina*, 259 F.3d at 224 (holding that INS agents are law enforcement officers within the meaning of Section 2680(h)); *Caban*, 671 F.2d at 1234 (same).

Moreover, the conflict is outcome determinative. If petitioners' case had arisen in the Eleventh Circuit, there clearly would have been subject-matter jurisdiction over their false imprisonment, abuse of process, and assault claims, since that court does not even consider whether the conduct giving rise to such claims involved discretionary acts. So, too, in the Second Circuit.

And although the remaining circuits would apparently require petitioners to "clear the 'discretionary function' hurdle," *Gray*, 712 F.2d at 508, many of them would still reach a different result than the Fifth Circuit en banc because in those circuits, allegations establishing that the agents'

conduct was *ultra vires* or unconstitutional would defeat the discretionary function exception.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 30, 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40416

MONICA CASTRO, For Herself and
as Next Friend of R.M.G.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

June 2, 2010, Filed

DAVIS, SMITH, WIENER, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges. HAROLD R. DeMOSS, JR., Circuit Judge, dissenting. CARL E. STEWART, Circuit Judge, joined by HAROLD R. DeMOSS, JR., Circuit Judge, dissenting. DENNIS, Circuit Judge, concurring in the judgment in part and dissenting in part.

OPINION

PER CURIAM:

I.

Monica Castro, for herself and as next friend of R.M.G., her minor child (jointly "Castro"), sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, alleging, *inter alia*,

that the government's negligence caused the wrongful deportation of R.M.G., a U.S. citizen. The government moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or, alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. The district court held that the government is protected from suit by 28 U.S.C. § 2680(a), the discretionary function exception of the FTCA. In a comprehensive and well-reasoned opinion, the court entered a final judgment dismissing Castro's tort claims for lack of subject matter jurisdiction and dismissing her constitutional and injunctive claims as moot. *Castro v. United States,* 2007 U.S. Dist. LEXIS 9440 (S.D. Tex. Feb. 9, 2007) (Jack, J.).

A divided panel of this court reversed and remanded. *Castro v. United States*, 560 F.3d 381 (5th Cir. 2009). The court granted rehearing en banc, thus vacating the panel opinion. *Castro v. United States*, 581 F.3d 275 (5th Cir. 2009). Concluding that the discretionary function exception applies, we affirm the judgment of the district court.

II.

The pertinent facts are not in dispute and are cogently set forth in the district court's and panel's opinions. Although, like the district court, we "[do] not condone the Border Patrol's actions or the choices it made," *Castro*, 2007 U.S. Dist. LEXIS 9440, at *27, the district court was correct in concluding that, because plaintiff's tort claims are barred by the discretionary function exception to the FTCA, the court was without subject matter jurisdiction, and the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) should be granted.

Correctly noting that the burden on a rule 12(b)(1) motion is on the party asserting jurisdiction – here, Castro – the court, in a comprehensive and convincing order, carefully explained that the two prongs of *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), are satisfied:

> . . . [T]he Border Patrol Agents' decision to let R.M.G. accompany her father back to Mexico was the product of a judgment or choice, and the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy . . . . [T]he Border Patrol Agents' decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case.

Castro, 2007 U.S. Dist. LEXIS 9440, at *22-*23, *33.

We affirm, essentially for the reasons given by the district court, the dismissal of the FTCA claims for want of jurisdiction. We also agree with the district court's explanation that the constitutional claims are moot, as is the claim for injunctive relief.

AFFIRMED.

CONCUR BY: DENNIS (In Part)

DISSENT BY: HAROLD R. DeMOSS; CARL E. STEWART; DENNIS (In Part)

DISSENT

HAROLD R. DeMOSS, JR., Circuit Judge, dissenting:

I concur in Judge Stewart's astute dissent. If the Border Patrol agents exceeded the scope of their authority, the discretionary function exception would not apply and Monica Castro's tort claims would not be barred by sovereign immunity. But, even if the Border Patrol agents acted within the scope of their authority and the discretionary function exception applied, Castro's claims for false imprisonment, abuse of process, and assault would not be barred by sovereign immunity. The law enforcement proviso waives sovereign immunity for those claims.

"Generally, sovereign immunity bars suits against the Government." *Ashford v. United States*, 511 F.3d 501, 504 (5th Cir. 2007). The Federal Tort Claims Act waives "the Government's sovereign immunity for torts committed by its employees in circumstances where, if the Government were a private person, the Government would be liable under state law." *Martin v. Halliburton*, 601 F.3d 381, 390-91 (5th Cir. 2010) (citations omitted); *see* 28 U.S.C. § 1346(b)(1). This general waiver of sovereign immunity is circumscribed by a list of exceptions in 28 U.S.C. § 2680. *Ashford*, 511 F.3d at 504. Pertinent to this appeal are the discretionary function and intentional tort exceptions.

Under § 2680 sovereign immunity is not waived when the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" (the discretionary

function exception) or when the claim arises "out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" (the intentional tort exception). 28 U.S.C. § 2680 (a) & (h). The law enforcement proviso in § 2680(h), however, provides an exception to these exceptions. *See Nguyen v. United States*, 556 F.3d 1244, 1255-56 (11th Cir. 2009); *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); *see also* § 2680(h). The proviso waives sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers" for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." § 2680(h). If the law enforcement proviso applies, sovereign immunity is waived and the discretionary function and intentional tort exceptions will not bar a plaintiff's claims for relief. *Nguyen*, 556 F.3d at 1256-57 (effecting "the plain meaning and clear purpose of the statutory language by concluding that sovereign immunity does not bar a claim that falls within the proviso to subsection(h), regardless of whether the acts giving rise to it involve a discretionary function"); *see Sutton*, 819 F.2d at 1297 (concluding that "the discretionary function exception cannot be an absolute bar which one must clear to proceed under [the] § 2680(h)" law enforcement proviso).

Monica Castro alleged the following torts against the United States: negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. The district court correctly found that the law enforcement proviso applies to Castro's claims for false imprisonment, abuse of process, and

assault. Neither party contests that finding. Because the law enforcement proviso applies, sovereign immunity is waived. The court has subject matter jurisdiction over these claims and the district court's holding to the contrary is in error.

For these reasons and for the reasons stated by Judge Stewart, I dissent.

CARL E. STEWART, Circuit Judge, joined by HAROLD R. DeMOSS, JR., Circuit Judge, dissenting:

With undisputed knowledge of the United States citizenship of baby girl R.M.G., Border Patrol agents in Lubbock, Texas, took R.M.G. into custody with her undocumented father, Omar Gallardo, when he was detained for removal. Monica Castro, R.M.G.'s United States citizen mother, pleaded with the Border Patrol to turn over her daughter and allow her to remain in the United States. Castro also frantically sought to secure a temporary custody order in a matter of hours. But on the very same day that R.M.G. and Gallardo were detained, and although Gallardo did not have a custody order in his favor, the Border Patrol deported R.M.G. and Gallardo to Mexico. Castro could not locate her daughter for the next three years.

The majority acknowledges the novel facts of this case, but minimizes their importance to the legal inquiry. The majority further erroneously applies the principles of Rule 12(b) according to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and disregards the Supreme Court's instruction to "narrowly construe[ ] exceptions to waivers of sovereign immunity . . . in the context of the sweeping language of the [FTCA]." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006)

(internal citations and quotation marks omitted). I therefore respectfully dissent.

I.

On behalf of herself and R.M.G., Castro brought state law claims of negligence, intentional infliction of emotional distress, and false imprisonment against the United States under the Federal Tort Claims Act ("FTCA"). Castro plausibly alleged that the Border Patrol exceeded the scope of its authority under the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.*, and the Fourth and Fifth Amendments. The discretionary function exception to the FTCA does not shelter against liability for unauthorized actions by government agents, yet the majority nonetheless applies the discretionary function exception without any inquiry into whether the Border Patrol agents acted in excess of their authority. In my view, the order granting the Government's Rule 12(b)(1) motion to dismiss based on the discretionary function exception should be vacated and the case remanded for an evaluation of whether the Border Patrol acted outside of its authority.

II.

The FTCA provides consent for suit against the United States "for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). One exception to the FTCA's consent-to-be-sued is the discretionary function exception, 28 U.S.C. § 2680(a),

the purpose of which is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy. . . ." *United States v. Gaubert,* 499 U.S. 315, 323 (1991). The discretionary function exception applies when: (1) the challenged government action involves "an element of judgment or choice" by a government agent and (2) the complained-of choice is "the kind that the discretionary function exception was designed to shield." *Id.* at 322-23 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

The discretionary function exception does not protect the unauthorized acts of government agents. *See Berkovitz*, 486 U.S. at 539 ("The discretionary function exception applies only to conduct that involves the *permissible* exercise of policy judgment.") (emphasis added); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment."). "[C]ourts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (internal citations omitted). This safeguard inherent in the discretionary function exception has been recognized by seven other circuits,[1] in addition to this

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[1] *See Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) ("It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed

circuit. *See Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (concluding that action by a government agent "does not fall within the discretionary function exception of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."). Despite the overwhelming weight of authority and our own precedent, the majority entirely ignores the principle that the discretionary function exception does not encompass unauthorized actions.

If the Border Patrol agents acted outside their scope of authority by violating R.M.G.'s constitutional

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by federal statute or regulation. Nor does it shield conduct that transgresses the Constitution.") (internal citations omitted); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (noting that the starting point of the discretionary function exception analysis is that "federal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("governmental conduct cannot be discretionary if it violates a legal mandate"); *Prisco v. Talty*, 993 F.2d 21, 26 n.14 (3d Cir. 1993) (concluding that the discretionary function exception was inapplicable to an FTCA claim based on conduct that violated plaintiff's constitutional rights); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196, 255 U.S. App. D.C. 162 (D.C. Cir. 1986) ("An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."); *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) ("An act that is clearly outside the authority delegated cannot be considered as an abuse of discretion.") (internal quotation marks and citations omitted).

rights, then those constitutional transgressions foreclose the protection of the discretionary function exception. A Border Patrol agent's authority is also limited by statutory mandates, therefore any actions of the Border Patrol agents in contravention of specific provisions of the INA or other statutes preclude the application of the discretionary function exception. *See Gaubert*, 499 U.S. at 324 ("If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."). The majority errs by concluding that the discretionary function exception deprived the district court of jurisdiction and dismissing Castro's claims without an evaluation of whether the actions of the Border Patrol agents exceeded the scope of their authority.

III.

A.

"Whether the district court lacked jurisdiction to consider the government's conduct in this case is a question of law, subject to de novo review by this Court." *Buchanan v. United States*, 915 F.2d 969, 970 (5th Cir. 1990) (internal citations omitted); *see also Limone*, 579 F.3d at 101 ("We afford de novo review to a district court's determination that the discretionary function exception does or does not apply."). To survive a motion to dismiss, a complaint need only contain sufficient factual matter to "state a claim for relief that is plausible on its face." *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133 (5th Cir. 2009) (citing *Twombly*, 550 U.S. at 544); *see also Iqbal*, 129 S. Ct. at 1950 (reiterating the *Twombly* holding that "a complaint that states a plausible claim

for relief survives a motion to dismiss."). All factual allegations contained in the complaint must be accepted as true. *Iqbal*, 129 S. Ct. at 1949.

B.

The majority acknowledges that we have before us a Rule 12(b)(1) dismissal, but it erroneously concludes that Castro has not met her burden under *Twombly* and *Iqbal*. To the contrary, based on the allegations contained in Castro's complaint, the Border Patrol agents' actions in detaining and deporting R.M.G. implicate both statutory and constitutional concerns. The facts included in the complaint – in particular the undisputed fact that the Border Patrol agents knew R.M.G's citizenship status and did not doubt that she was a United States citizen – support a plausible claim that the Border Patrol agents exceeded the scope of their statutory and constitutional authority and their actions were therefore non-discretionary.

Castro's complaint alleged a plausible violation of specific constitutional mandates: the Fourth Amendment right to be free from unreasonable seizure and the Fifth Amendment right to due process. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (explaining that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens"); *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990) (observing that "the right of a United States citizen to enter the country is a right which the fundamental law has conferred upon him" and "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.") (internal

citations and quotation marks omitted). In her complaint, Castro alleged the following:

> Defendant United States' detention of Plaintiff R.M.G. without due process violated her Fourth Amendment constitutional interest in remaining free from bodily seizure. . . . Detention of Plaintiff R.M.G. was not due to an act of wrongdoing that warranted detention nor was detention based on an emergency. The United States did not and cannot show that seizure of the minor child was necessary to protect Plaintiff R.M.G.'s health, safety and welfare; indeed, Defendant United States placed R.M.G. in imminent danger by deporting her with a man it knew was wanted in connection with a homicide.
>
> . . . Plaintiff Castro made a claim of citizenship to Defendant United States on behalf of her minor child, Plaintiff R.M.G. Despite that claim, and despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment.
>
> . . . Defendant United States willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification. . . . From the moment Defendant United States knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession

> of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child.

Castro's complaint additionally alleged that the Border Patrol agents acted outside of their statutory grant of authority under the INA, averring that "[n]o section of [the INA] provides authority for the United States to detain or remove a U.S. citizen." The Border Patrol is an agency of the Department of Homeland Security, and subject to the INA. *See* 8 C.F.R. § 1.1. The INA's scope is limited to regulating the entry of aliens, as well as their detention, removal, and naturalization. *See, e.g.*, 8 U.S.C. §§ 1101(a)(23), 1103(a)(1), 1231(a). Within this statutory grant of authority, Border Patrol agents have discretion in making determinations in matters such as the detention or removal of aliens illegally present in the United States. *See, e.g.*, 8 U.S.C. § 1226; 8 C.F.R. §§ 236.1-236.7; *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (explaining the broad INS discretion "in determining who, among a class of eligible aliens, may be granted relief" from removal). No statute grants Border Patrol agents the power to deport United States citizens, however, and the power of Border Patrol agents to detain United States citizens is quite limited. *See* 8 U.S.C. § 1357(a)(5). Nor do Border Patrol agents have statutory authority to make child custody decisions. *Johns v. Dep't of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981) ("Federal immigration authorities lack authority to determine custody of a child or to enforce the custodial rights of others.").

Despite the Border Patrol agents' conceded knowledge of R.M.G.'s citizenship and Castro's

plausible allegations of constitutional and statutory violations, the district court opinion – relied upon by the majority – failed to address whether the Border Patrol agents exceeded their scope of authority. This crucial omission in the district court's Rule 12(b)(1) analysis allows any actions taken by the Border Patrol agents in excess of their authority to nonetheless benefit from the protection of the discretionary function exception. The majority opinion therefore effectively bestows immunity from FTCA liability upon even the most egregious constitutional and statutory violations by government agents, which may reach far beyond their actual authority. This outcome contravenes the fundamental purpose of the FTCA; such an "unduly generous interpretation [ ] of the exception[ ] run[s] the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language." *Dolan*, 546 U.S. at 492 (internal citations and quotation marks omitted).

IV.

The majority opinion weakens a critical, inherent safeguard of the discretionary function exception and neglects Castro's patently plausible allegations of unauthorized actions by the Border Patrol agents in addressing the 12(b)(1) dismissal. I therefore respectfully dissent from the holding of the court. I would vacate the order of the district court and remand for a ruling on whether the Border Patrol agents acted within the scope of their authority.

DENNIS, Circuit Judge, concurring in the judgment in part and dissenting in part.

I agree with the dissents of Judges DeMoss and Stewart concerning the scope of the federal government's waiver of sovereign immunity under the Federal Tort Claims Act, the law enforcement proviso, and the discretionary function exception. However, I partially disagree with them regarding the legal significance of the underlying facts in this case. Therefore, I concur in the result as to the majority's affirmance of the dismissal of most of the plaintiffs' claims, but I dissent as to the claims for abuse of process and assault, which should be remanded to the district court for further proceedings.

First, I agree with Judge DeMoss's dissent that the federal courts have subject matter jurisdiction over the plaintiffs' claims for abuse of process, assault, and false imprisonment, because the federal government has waived its sovereign immunity as to those claims through the FTCA's law enforcement proviso, 28 U.S.C. § 2680(h).[1] *See Nguyen v. United States*, 556 F.3d 1244, 1255-56 (11th Cir. 2009). The district court therefore erred by dismissing these claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

It is not clear to me whether the plaintiffs' claims for abuse of process and assault can survive a Rule 12(b)(6) motion to dismiss. The district court did not decide whether these claims are viable because it

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[1] "[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the FTCA] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h).

erroneously dismissed the claims for lack of subject matter jurisdiction under Rule 12(b)(1). I would remand those claims to be resolved in the first instance by the district court.

However, with respect to false imprisonment, the plaintiffs have clearly failed to state a claim on which relief can be granted. The elements of false imprisonment under Texas law are "(1) willful detention; (2) without consent; and (3) without authority of law." *Bossin v. Towber*, 894 S.W.2d 25, 29 (Tex. App. 1994) (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985)). When Omar Gallardo, the father, was arrested, R.M.G., the baby girl, was with him. Gallardo wanted to keep his daughter with him while he was being detained (for less than a day) and deported, and the Border Patrol acquiesced. R.M.G. was a baby and therefore lacked the ability to consent independently, but her father could and did consent on her behalf to her remaining with him. Because R.M.G.'s presence in the Border Patrol station was not without consent, it did not amount to false imprisonment. The false imprisonment claim should therefore be dismissed for failure to state a claim on which relief can be granted, under Rule 12(b)(6).

As to the plaintiffs' remaining claims, which do not fall within the law enforcement proviso, I agree with the legal framework set forth in Part II of Judge Stewart's dissent. As Judge Stewart explains, the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a),[2] does not encompass actions by

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[2] Section 2680(a) excludes from the FTCA "[a]ny claim . . . based upon the exercise or performance or the failure to exercise

government agents that are "unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003); *see also Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."). I therefore agree with Judge Stewart that the district court erred in its reasoning by failing to consider whether the Border Patrol agents' actions violated any statutory or constitutional requirements before it decided that the plaintiffs' claims were barred by the discretionary function exception.

Nevertheless, I believe that the plaintiffs' claims – except for those covered by the law enforcement proviso, as discussed above – must be dismissed for lack of subject matter jurisdiction because they are barred by the FTCA's discretionary function exception. The facts as alleged by the plaintiffs do not disclose any constitutional or statutory violations that would make the discretionary function exception inapplicable. Again, Gallardo had his daughter, R.M.G., with him when he was arrested. By permitting Gallardo to keep R.M.G. with him, the Border Patrol agents did not improperly make a custody determination; rather, they left the status quo in place

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or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Such claims are excluded from the FTCA's waiver of sovereign immunity, and the federal courts therefore lack subject matter jurisdiction over them.

and refrained from making a custody determination, in that they declined to take R.M.G. away from Gallardo against his will. The Border Patrol agents cannot be meaningfully said to have "detained" or "deported" R.M.G., because it was Gallardo, and not the Border Patrol, who decided that the baby should go with him to Mexico. Monica Castro, R.M.G.'s mother, disagreed with Gallardo's decision and wanted the Border Patrol to transfer the baby to her, but she lacked a court order or any other source of legal authority requiring the Border Patrol to take such action. The Border Patrol, by accepting Gallardo's decision to keep R.M.G. with him, did not violate any constitutional or statutory requirement that the plaintiffs have identified.

Because there was no constitutional or statutory violation, the Border Patrol's alleged actions fall within the FTCA's discretionary function exception, and the federal courts therefore lack jurisdiction over the plaintiffs' claims, except for those that are covered by the law enforcement proviso as discussed above. Accordingly, I concur in the judgment except as to the claims for abuse of process and assault. I would remand those two claims to the district court to allow it to decide in the first instance whether they should be dismissed under Rule 12(b)(6).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40416

MONICA CASTRO, For Herself and
as Next Friend of R.M.G.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

February 20, 2009, Filed

JUDGES: Before SMITH, DeMOSS, and STEWART, Circuit Judges. JERRY E. SMITH, Circuit Judge, dissenting.

OPINION BY: CARL E. STEWART

OPINION

CARL E. STEWART, Circuit Judge:

Plaintiffs-Appellants Monica Castro for herself and as next friend of R.M.G., a minor child (collectively "Castro"), brought suit against the United States of America ("the Government") under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* Castro alleged, *inter alia,* that the Government's negligence caused the wrongful deportation of R.M.G., a U.S.

citizen. The Government filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or, alternatively, for summary judgment pursuant to Rule 56. The district court held that the Government is protected from suit due to 28 U.S.C. § 2680(a), the discretionary function exception of the FTCA. Subsequently, the district court entered a final judgment dismissing Castro's tort claims for lack of subject matter jurisdiction and dismissing her constitutional claims as moot. Castro timely appealed.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts in this case are not in dispute. Castro, a United States citizen, moved with her parents from Corpus Christi, Texas to Lubbock, Texas when she was approximately fifteen years old. Around that time, Castro met Omar Gallardo, an illegal alien and Mexican national. When Castro was sixteen, she and Gallardo moved together into a trailer near the trailer that Castro's parents rented. On December 4, 2002, Castro gave birth to her and Gallardo's daughter, R.M.G. R.M.G., who was born at the University Medical Center in Lubbock, is a citizen of the United States. Castro was seventeen at the time of R.M.G.'s birth.

Castro and Gallardo had a history of arguing with each other, and Castro contends that Gallardo abused her during the course of their relationship, although she informed neither her parents nor law enforcement authorities of this abuse. Castro maintained that Gallardo was a good father to R.M.G., and that he never abused their daughter.

On November 28, 2003, Castro and Gallardo got into an argument, and as a result, Castro called and

asked her grandparents to come and pick her up. They came the following day, and Castro left the trailer; R.M.G. remained with Gallardo. Immediately thereafter, Castro commenced efforts to recover R.M.G. from Gallardo. Specifically, she contacted the Lubbock County Sheriff's Department, Texas Child Protective Services ("CPS"), and the Lubbock Police Department. The agencies told her that since she was married to Gallardo pursuant to a common-law marriage,[1] and because Gallardo was the child's father, Gallardo had as much right to R.M.G. as she did. Further, Castro was told that her issues with Gallardo constituted a civil dispute, and that she would have to hire a private attorney to seek a custody order. CPS did tell Castro that she could fill out an application to start the process for obtaining assistance from CPS, but that the process would take one to two days. Castro did not fill out the application because she said she did not want to wait one to two days.

On December 1, 2003, Castro, along with her aunt, Sophia Rodriguez, went to the Lubbock Border Patrol station to report that Gallardo was an illegal alien. They spoke with Border Patrol Agent Manuel Sanchez, and they told Sanchez that while Gallardo currently had R.M.G., Castro wanted to recover R.M.G. from

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[1] There is a dispute about whether Castro and Gallardo had a legally-established common-law marriage at the time of R.M.G.'s birth. Before the district court, Castro argues that she could not have agreed to a common-law marriage until her eighteenth birthday, which was April 30, 2003. This issue was not resolved by the district court. However, there is no dispute that Gallardo is R.M.G.'s biological father; accordingly, we need not resolve whether there was a common-law marriage.

him.[2] Agent Sanchez informed Castro that she needed to get a court order for temporary custody of R.M.G. However, Agent Sanchez said that if Castro was present when Border Patrol apprehended Gallardo and certain of his relatives, who were also illegal aliens, Border Patrol would leave R.M.G. with Castro, since they both were U.S. citizens. However, Castro did not wish to be present when Border Patrol went to the trailer because she was afraid of what Gallardo and his family would do to her. Accordingly, on the morning of December 3, 2003, Castro was not present when Border Patrol Agents arrived at the trailer Castro shared with Gallardo; rather, Castro watched the events unfold from her relatives' trailer across the street.

Border Patrol took Gallardo, three of his brothers, and his cousin to the Lubbock Border Patrol station. Since Gallardo had R.M.G. with him, R.M.G. was also taken to the station. Gallardo, R.M.G., and Gallardo's relatives were all placed in a holding cell at the station.

Shortly thereafter, Castro arrived at the station and requested that her daughter be returned to her. However, Gallardo informed the Border Patrol Agents that Castro had walked out on him and R.M.G. and that he wanted R.M.G. to remain with him. At the direction of Greg Kurupas, who was the agent-in-charge, Agent Sanchez contacted Debbie Perkins-McCall of the Texas Department of Family and Protective Services ("DFPS") in Lubbock. Since there

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[2] Agent Sanchez informed Castro that Amarillo law enforcement authorities wanted to question Gallardo as a possible witness in connection with a homicide.

was no evidence that R.M.G. was abused or neglected, Agent Sanchez was informed that DFPS would not get involved.[3] Meanwhile, Border Patrol processed Gallardo and his relatives and prepared to repatriate them back to Mexico. While in custody, Gallardo admitted he was in the United States illegally and chose to reinstate an earlier deportation order. The transport to Mexico from Lubbock left at 3:15 p.m. daily, and Border Patrol made plans to send Gallardo and his relatives at that time.

Around 1:30 in the afternoon, Castro and her relatives retained an attorney, Lisa Trevino, in order to obtain a temporary custody order. Trevino drafted the necessary paperwork and proceeded to the courthouse to get a judge's signature on the order. Trevino told Agent Kurupas that she was working on obtaining a judge's signature on a temporary custody order; however, the agent told her that the repatriation transport had to leave by 3:15 p.m. By the time the transport left, Trevino had been unable to obtain a judge's signature. Trevino never filed any documents with the state court regarding the custody

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[3] Perkins-McCall testified before the district court: "In December of 2003, I received a telephone call from a male Border Patrol Agent and he advised me that he had a Mexican citizen father with possession of his child and that the father was to be returned to Mexico. He further advised me that the mother sought possession of the child, but that the father did not want to relinquish possession of the child. The agent asked me if this was a situation in which our department would get involved. I asked the agent if there was any issue of abuse of the child or harm to the child and he advised me there was not. I told him that absent any issue of abuse of the child or harm to the child, the Texas Department of Family and Protective Services would not get involved."

of R.M.G., and she did not further pursue a custody order for Castro.

The transport left Lubbock around 3:15 p.m. on December 3, 2003 with Gallardo onboard, along with R.M.G. In September 2006, Gallardo was detained in the Amarillo area on charges of illegal reentry. While he was in custody, Gallardo and Castro came to an agreement whereby R.M.G., who was living in Mexico with Gallardo's parents, would be returned to the custody of Castro. R.M.G. was returned to Castro's custody on December 1, 2006.

Castro filed a lawsuit on February 10, 2006, in the United States District Court for the Southern District of Texas on her own behalf and as next friend of her daughter, R.M.G. In her original complaint, Castro sought monetary damages and injunctive relief pursuant to the Fourth, Fifth, and Tenth Amendments of the United States Constitution, as well as claims of negligence, intentional infliction of emotional distress, and false imprisonment against the United States pursuant to the FTCA. The district court dismissed Castro's constitutional claims for monetary relief, holding that such claims were barred by the doctrine of sovereign immunity. Castro then filed her First Amended Complaint on May 19, 2006. In this complaint, Castro asserted claims for injunctive relief under the Fourth and Fifth Amendments of the United States Constitution as well as claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault pursuant to the FTCA. Castro also asserted a claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, *et. seq.*

On November 14, 2006, the Government filed a motion to dismiss pursuant to Rule 12(b)(1), and in the alternative, motion for summary judgment pursuant to Rule 56. The Government argued, *inter alia,* that the district court did not have subject matter jurisdiction over Castro's tort claims because they are barred by the discretionary function exception to the FTCA. On February 9, 2007, the district court granted the Government's motion to dismiss for lack of subject matter jurisdiction; the court also held that Castro's claims for relief under the Fourth and Fifth Amendments and her claim for injunctive relief pursuant to 8 U.S.C. § 1101, *et. seq.* were moot and therefore dismissed them as well. On April 4, 2007, the district court dismissed Castro's only remaining claim which sought declaratory relief "in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G." for lack of standing. That same day, the district court entered its final judgment dismissing the action in its entirety with prejudice.

Castro timely filed her notice of appeal. The only issue Castro raises on appeal is whether the district court erred in dismissing her FTCA claims for lack of subject matter jurisdiction.

STANDARD OF REVIEW

"Whether the district court lacked jurisdiction to consider the government's conduct in this case is a question of law, subject to *de novo* review by this court." *Buchanan v. United States,* 915 F.2d 969, 970 (5th Cir. 1990) (citing *Baker v. United States,* 817 F.2d 560, 562 (9th Cir. 1987)). The party asserting

jurisdiction bears the burden of proof for a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). A motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction. *See Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007)). "[U]nder Rule 12(b)(1), the court may find a plausible set of facts supporting subject matter jurisdiction by considering any of the following: '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Lane,* 529 F.3d at 557 (quoting *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996) (internal citations omitted)).

DISCUSSION

"As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued." *Truman v. United States,* 26 F.3d 592, 594 (5th Cir. 1994) (citing *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471 (1994)). Through the FTCA, the United States has consented to suits "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b)(1); *see also Truman,* 26 F.3d at 594 ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions

of its agents who act within the scope of their employment.")

There are a number of statutory exceptions to the FTCA, two of which are relevant to the resolution of this appeal. First, the "intentional tort" exception provides that the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). However, that same provision also waives sovereign immunity for the intentional torts of law enforcement and investigative officers. *Id.* (explaining that the FTCA shall apply "to acts or omissions of investigative or law enforcement officers of the United States Government . . . [for] any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.").[4]

The other relevant exception is the "discretionary function" exception, which provides that the United States is not liable for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or

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[4] This court has previously addressed the congressional intent of § 2680(h): "Congress, in response to 'no knock' raids conducted by federal narcotic agents on the wrong dwellings, passed the 1974 amendment to the Federal Tort Claim Act to provide compensation [for the victims]." *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977).

> perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a); *see also Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[T]he government is not liable for any claim arising from the exercise of discretion in the performance of governmental functions or duty whether or not the discretion involved be abused.") (citing *Dalehite v. United States*, 346 U.S. 15, 33 (1953) (internal quotation marks omitted)). "The exception only covers acts that are discretionary in nature, acts that 'involve an element of judgment or choice.' " *Gaubert*, 499 U.S. at 322 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), the Supreme Court explained that it is the nature of the conduct and not the status of the government actor that governs whether the exception applies.

In *Gaubert*, the Supreme Court laid out a two-step test for determining whether the discretionary function exception applies to a federal employee's act or omission. First, the challenged government action must be "the product of judgment or choice." *Gaubert*, 499 U.S. at 322. This Court has explained:

> Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however,

> the governmental action is considered discretionary and the first prong is satisfied.

Garza v. United States, 161 Fed. Appx. 341, 343 (5th Cir. 2005) (internal citation omitted). Second, the court must decide whether the complained of judgment or choice "is of the kind that the discretionary function exception was designed to shield" because the purpose of the exception "is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 322-23 (internal quotation marks and citations omitted). This Court has written that for this prong, "the appropriate inquiry is whether the act in question is susceptible to policy analysis." *Baldassaro v. United States*, 64 F.3d 206, 211 (5th Cir. 1995) (internal citation omitted).

As already noted, in the proceedings below, the district court granted the Government's motion to dismiss pursuant to Rule 12(b)(1). While the district court stated that the aforementioned "law enforcement provision" of § 2680(h) applied to Castro's assault, abuse of process, and false imprisonment claims, the court ultimately concluded that it lacked subject matter jurisdiction because her FTCA claims could not survive the discretionary function exception. The district judge first determined that the first prong of the *Gaubert* test was satisfied because the Border Patrol Agents' actions were the product of judgment or choice. In reaching that determination, she highlighted that Castro failed to obtain a custody order granting her custody of R.M.G., and because of that, she placed the Agents in a "difficult situation" – namely, they had to either forcibly remove R.M.G.

from Gallardo's custody even though there was no court order directing them to do so, or let Gallardo continue with possession of R.M.G., even though Gallardo was being repatriated to Mexico. After concluding that there were no statutes, regulations, or policies mandating that the Agents take a certain course of action in this situation[5] and rejecting Castro's argument that the Agents had made an unauthorized custody determination as to R.M.G., the district judge concluded that the Agents "were left to make a difficult decision, one that was a product of judgment or choice. . . ." She also held that the Border Patrol Agents' actions satisfied the second prong of the *Gaubert* test because their "decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." *See, e.g., Baum v. United States,* 986 F.2d 716, 724 (4th Cir. 1993) (a decision as to the best allocation or use of resources is "inherently bound up in considerations of economic and political policy, and accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second-guessing. . . .").

On appeal, Castro argues that the district court unduly narrowed the coverage of the FTCA by improperly expanding the scope of the discretionary

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[5] The Government submitted evidence before the district court that: "there are no policies, rules or statutes governing the apprehension and detention of a foreign national in lawful custody of his or her U.S. juvenile child. . . ." Castro does not disagree with that assessment.

function exception. She contends that the district court wrongly interpreted and applied the holdings of *Gaubert* and related precedent, because, while the Border Patrol Agents' actions were the product of choice or judgment, their actions not only exceeded the scope of their authority, but also violated the federal Constitution. Further, according to Castro, the Agents' actions lacked any connection to the social or economic policy of the regulatory regime that establishes the authority of the Border Patrol. The Government urges this court to affirm the district court's determination, contending that the Agents' actions in this case are clearly covered by the discretionary function exception of the FTCA. It argues that the district court properly applied *Gaubert,* and that its judgment dismissing Castro's FTCA claims for lack of subject matter jurisdiction should be affirmed.

We first observe that we agree with the district court that the law enforcement proviso applies to some of Castro's FTCA claims since Border Patrol Agents are federal law enforcement officers for purposes of the FTCA. *See Ysasi v. Rivkind,* 856 F.2d 1520, 1524-25 (Fed. Cir. 1988) (explaining that Border Patrol Agents are federal law enforcement officers for the purposes of the FTCA). However, we disagree with the lower court's conclusions regarding the discretionary function exception. Even though an argument can be made that the district court properly analyzed the two *Gaubert* factors, that court erred by not first considering whether the Border Patrol Agents exceeded the scope of their authority. In *Sutton,* we explained: "[W]e have not hesitated to conclude that such action does not fall within the discretionary function exception of § 2680(a) when governmental

agents exceed the scope of their authority as designated by statute or the Constitution." 819 F.2d at 1293. This principle of law has been recognized by a majority of other circuits as well. *See, e.g., Raz v. United States,* 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."); *Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) (noting that the starting point of analysis is that "federal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *United States Fid. & Guar. Co. v. United States,* 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States,* 226 F.3d 996, 1002 (9th Cir. 2000) (holding the Constitution limits the discretion of federal officials such that the discretionary function exception will not apply); *Prisco v. Talty,* 993 F.2d 21, 26 n. 14 (3d Cir. 1993) (concluding that the discretionary function exception was inapplicable to an FTCA claim based on conduct that violated plaintiff's constitutional rights); *Red Lake Band of Chippewa Indians v. United States,* 800 F.2d 1187, 1196 (D.C. Cir. 1986) ("A corollary to these principles, and our basis for affirming the district court's holding on this issue, is that a decision cannot be shielded from liability if the decisionmaker is acting without actual authority. . . . An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."); *Birnbaum v. United States,* 588 F.2d 319, 329 (2d Cir. 1978) ("A discretionary function can derive only from properly delegated authority. Authority generally stems from a statute or

regulation, or at least from a jurisdictional grant that brings the discretionary function within the competence of the agency. Discretion may be as elastic as a rubber-band, but it, too, has a breaking point. An act that is clearly outside the authority delegated cannot be considered as an abuse of discretion." (internal quotation marks and citations omitted)); *but see Kiiskila v. United States,* 466 F.2d 626, 627-28 (7th Cir. 1972) (holding that conduct by commanding officer of military base, although "constitutionally repugnant," fell within the discretionary function exception).

Admittedly, this court and others have been less than clear about where this "scope of authority" analysis fits within the *Gaubert* factors: arguably some courts have treated it as a prerequisite, *see, e.g., Nurse,* 226 F.3d at 1001-02, while others have seemingly integrated it into the first *Gaubert* factor. *See, e.g., McElroy v. United States,* 861 F. Supp. 585, 593 (W.D. Tex. 1994). Nevertheless, it is overwhelmingly clear that, as the First Circuit has written, "courts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, prescribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (internal citations omitted). Because the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply, if the Agents acted in violation of R.M.G.'s constitutional rights, and therefore outside their scope of authority, that conclusion would eclipse

the district court's analysis under the *Gaubert* framework.

We now turn to consider whether Castro sufficiently alleged that the Border Patrol Agents violated the scope of their authority here. In her complaint, Castro states that the Agents violated R.M.G's Fourth and Fifth Amendment rights when they detained her in immigration custody with Gallardo and his relatives even though they knew she was a U.S. citizen, and that such actions not only went beyond the scope of their authority, but also violated the constitution.[6] While it is well-recognized that violations of constitutional mandates are not actionable under the FTCA, *see Meyer,* 510 U.S. at 478 ("The United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."), the occurrence of such a violation would involve the performance of a non-discretionary function for jurisdictional purposes, if the constitutional tort is also cognizable as an intentional tort under state law. As a federal district court explained:

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[6] *See, e.g.,* First Amended Complaint at paragraphs 36 ("despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment"), 69 (border officials "willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification"), and 70 (once border officers "knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child").

> [A] court must determine whether there is a specific and intelligible constitutional mandate that involves or is related to the alleged intentional torts of the accused officer(s). If such a mandate exists, the Court will conclude, for jurisdictional purposes only, that the alleged torts occurred during the performance of a non-discretionary function. Upon reaching such a conclusion, the Court may determine the merits of the section 2680(h) intentional tort claims under the applicable state tort law.

McElroy, 861 F. Supp. at 593-94. As the *McElroy* court recognized, "[t]he *Gaubert* test merely instructs the reviewing court to determine whether the alleged conduct 'involve[s]' mandatory compliance with a federal statute, regulation, or policy, not whether the statute, regulation, or policy was violated." *Id.* at 593 n. 16; *see also Garcia v. United States*, 896 F. Supp. 467, 475-76 (E.D. Pa. 1995) ("Because we cannot at this point preclude the possibility that the inspectors' conduct was unconstitutional, we cannot hold that the challenged conduct falls within the discretionary function exception."). Accordingly, the issue before us is whether the complaint and any properly-considered facts could support a finding that the Border Patrol Agents' alleged conduct exceeded the scope of their statutory or constitutional authority, not determining whether such a violation actually occurred.

We hold that Castro's complaint does sufficiently allege that the Border Patrol Agents' actions exceeded the scope of their authority. The Border Patrol, officially called The Bureau of Customs and Border Protection, is an agency of the Department of

Homeland Security, and is specifically included as a defined agency subject to the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.* *See* 8 C.F.R. § 1.1. Fundamentally, the INA's scope is limited to regulating the entry of aliens as well as their detention, expulsion/removal, and naturalization. *See, e.g.,* 8 U.S.C. § 1103(a)(1); 8 U.S.C. § 1101(a)(23). Within this statutory grant of authority, Border Patrol Agents have, *inter alia,* broad discretion in making determinations in matters such as the detention, parole, or deportation of foreign nationals illegally present in the United States. *See, e.g.,* 8 U.S.C. § 1226; 8 C.F.R. §§ 236.1-236.7; *INS v. Yueh-Shaio Yang,* 519 U.S. 26, 30 (1996) (explaining the broad INS discretion in determining who, along a class of eligible aliens, may be granted relief from removal). However, the power of Border Patrol Agents to detain U.S. citizens is quite limited. While Border Patrol Agents possess a general arrest authority for crimes committed in their presence, 8 U.S.C. § 1357(a)(5), generally speaking they do not have authority to arrest or detain U.S. citizens. *See, e.g., United States v. Brignoni-Ponce,* 422 U.S. 873, 884 (1975) (writing that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

The Government makes two arguments for why the Agents were within their statutory grant of authority. First, it cites 8 C.F.R. § 240.25(b) which states that immigration officials "may attach to the granting of voluntary departure any conditions [they] deem[ ] necessary to ensure the alien's timely departure from the United States. . . ." The Government contends that this is simply all the

Agents did here. Second, it cites 8 U.S.C. § 1103(a)(3) which provides that the Secretary of Homeland Security "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." The Government then relies on language from *Gaubert* to make the argument that the Agents' actions were all planning-level decisions that are covered by the discretionary function exception. *See* 499 U.S. at 323 ("Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs.").

Both of these arguments are unavailing. The Government's first argument fails because, as Castro highlights, Gallardo was removed in December 2003 pursuant to the reinstatement of a prior order of removal and not by voluntary departure; therefore 8 C.F.R. § 240.25(b) is simply irrelevant. The Government's second argument is without merit because even though governmental actors have wide discretion to carry out their statutory and regulatory obligations, courts have never interpreted delegated authority so broadly as to infringe upon constitutionally-protected rights and freedoms. *See, e.g., Hernandez v. Cremer,* 913 F.2d 230, 237 (5th Cir. 1990) (explaining that courts should "construe narrowly all [Congressionally-] delegated powers that

curtail or dilute [constitutional protections.]" (citing *Kent v. Dulles*, 357 U.S. 116, 129 (1958))). The Government's contention that 8 U.S.C. § 1103(3) could be interpreted so broadly as automatically to override R.M.G.'s Fourth Amendment right from unreasonable seizure or her Fifth Amendment right to due process is simply untenable.

We are cognizant of the challenging circumstances in which Border Patrol Agents undoubtedly often find themselves because of the complexities of immigration enforcement, and we agree with the district court that, particularly in this instance, they were faced with a "difficult situation."[7] As such, we emphasize the narrowness of our holding. Had the Border Patrol Agents not known R.M.G.'s citizenship status or if they had doubted Castro's assertions that R.M.G. was a U.S. citizen, their decision to detain the child with her father would likely not be intertwined with the constitutional strands that are prominent in this appeal of a 12(b)(1) dismissal for lack of subject matter jurisdiction. However, here the Agents concede that they knew R.M.G. was a U.S. citizen.

Castro alleges a plausible set of facts supporting subject matter jurisdiction because based on her complaint, the Border Patrol Agents' actions in detaining R.M.G. implicate constitutional concerns and, therefore, may have been non-discretionary. We

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[7] Of course, while it is true that this entire situation could have been avoided had Castro obtained a custody order before the repatriation transport carrying Gallardo and R.M.G. left, ultimately Castro's actions are irrelevant in determining whether the Border Patrol Agents' actions are covered by the discretionary function exception.

hold that the district court legally erred in concluding that the discretionary function exception to the FTCA deprived it of jurisdiction without first determining whether the Agents' conduct was outside their scope of authority.[8] We remand this case for the district court to consider in the first instance to what extent the alleged constitutional violations are cognizable under Castro's FTCA claims. We highlight that our holding is limited to the jurisdictional question presented on appeal; nothing we have written should be interpreted to speak to the merits of either Castro's allegations of constitutional violations or her FTCA claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court as to Castro's FTCA claims is REVERSED, and this case is REMANDED for proceedings not inconsistent with this opinion.

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[8] Accordingly, we need not address Castro's argument that the Agents also exceeded their authority by making a *de facto* custody determination.

JERRY E. SMITH, Circuit Judge, dissenting:

> *And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other.* 1 Kings 3:24-25.

We face a situation at least as old as the one faced by King Solomon, and one requiring his wisdom: what to do when two parents claim a child. I am no Solomon, and neither is the majority. I do not know the right answer, if there is one, and neither do my able colleagues. It is not the job of the federal courts to make that choice or to second-guess the decision of those to whom the heavy responsibility is given.

For two reasons, I respectfully dissent. First, the majority fundamentally misunderstands sovereign immunity and the Federal Tort Claims Act ("FTCA"), falling for the alluring but empty belief that if something really unfortunate occurs, someone always must pay. Prodded by that misunderstanding, the majority eviscerates much of the discretionary function exception, holding that *whenever* a Border Patrol officer violates the Constitution – even if he has no reason to know he is doing so – he *necessarily* acts beyond his discretion. The majority's approach subjects the United States to substantial liability that is neither authorized by statute nor compelled by precedent. Second, even under the majority's misguided theory, the United States should not be liable, because, under Castro's complaint, the Border Patrol agents did not violate R.M.G.'s constitutional rights or otherwise exceed their lawful authority.

I. The Majority Misunderstands Sovereign Immunity.

Because of sovereign immunity, matters of the federal fisc are left to the political branches unless the government has explicitly waived its immunity. *See Truman v. United States,* 26 F.3d 592, 594 (5th Cir. 1994). Under the FTCA, the United States has consented to certain types of suits, 28 U.S.C. § 1346(b), but the waiver of immunity is far from complete, and there are a number of exceptions, including the discretionary function exception, 28 U.S.C. § 2680(a), which denies subject-matter jurisdiction to the federal courts over a great deal of potentially unlawful conduct.[1] Likewise, consistently with the purposes and history of sovereign immunity, "the exceptions that do appear in the FTCA must be strictly construed in favor of the government." *Truman,* 26 F.3d at 594 (*citing Atorie Air, Inc. v. Fed. Aviation Admin.,* 942 F.2d 954, 958 (5th Cir. 1991)). These basic principles of sovereign immunity are not contested.

The majority nonetheless cites *dictum* from *Sutton v. United States,* 819 F.2d 1289, 1293 (5th Cir. 1987), and opinions from other circuits, for the astoundingly broad proposition that the FTCA's discretionary function exception does not apply *whenever* a federal official – even without good reason to know – violates someone's constitutional rights. Nothing in *Sutton,* however, turned on whether a constitutional right was violated; the defendants did not plead any such violation. *See id.* at 1291. Rather, the case concerned

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[1] The discretionary function exception bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

the interplay between the discretionary function exception and the intentional tort exception's "law enforcement proviso,"[2] with the entire matter remanded "because [the district court] decided [it] on inadequate factual allegations which prevent[ed] us from evaluating the appellants' cause of action in light of the differing statutory policies" of the two exceptions. *Id.* at 1292.

Thus, until now, *Sutton's* outlier and truncated musing that constitutional rights are somehow categorically outside of the discretionary function exception has not been the law of the Fifth Circuit. It is, first and foremost, irreconcilably inconsistent with Supreme Court precedent. For instance, it contravenes *United States v. Gaubert,* 499 U.S. 315, 322-23 (1991), which holds that the discretionary function bars federal jurisdiction to review a federal officer's conduct unless "a federal statute, regulation, or policy specifically prescribe[d] a course of action," provided that the decision was of the type that ought not be "second-guess[ed]" because it is "grounded in social, economic, and political policy. . . ." The omission of "Constitution" from the Court's explicit list of sources that can create a "mandate" that nullifies the discretionary function exception should be dispositive here.

This obvious reading of *Gaubert* finds additional support in *FDIC v. Meyer,* 510 U.S. 471, 478 (1994), which says that "the United States simply has not rendered itself liable under § 1346(b) [*i.e.*, the FTCA]

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[2] 28 U.S.C. § 2680(h). Castro does not allege that § 2680(h) has any bearing on this case.

for constitutional tort claims." If all violations of the federal constitution render the discretionary function exception inapt, *Meyer* is effectively voided. In sum, the majority's strained attempt to "eclipse the district court's analysis under the *Gaubert* framework" utterly fails.

It is difficult to conceive of a violation of a constitutional right that does not also give rise to a state cause of action. For instance, many violations of the Eighth Amendment by prison officials likely also constitute negligence under state law. Unconstitutional searches theoretically can be cognizable as trespass. Violations of the Third Amendment can be characterized as a trespass or an invasion of privacy. Until now, under *Meyer*, we lacked jurisdiction to consider these "constitutional tort claims."

Under the majority's framework, by a plaintiff's artful pleading, the United States can be liable whenever the Constitution is violated even though, under *Meyer,* the sovereign is not subject to liability for constitutional torts. The majority's two-step rubric would go like this: First, allege a constitutional violation, thereby avoiding the discretionary function exception. Second, plead a state cause of action that overlaps with that constitutional violation, then seek damages under that state cause of action. *Voila!* No more sovereign immunity.

Properly understood, however, federal sovereign immunity is more robust than that. In *Santos v. United States*, ___Fed. Appx. ___, No. 05-60237, 2006 WL 1050512 (5th Cir. Apr. 21, 2006) (per curiam) (unpublished), we affirmed the dismissal of a

prisoner's state law negligence claim that overlapped with his contention that the Eighth Amendment had been violated. The plaintiff argued that his negligence claims should go forward, despite the discretionary function exception, because "no one has discretion to violate another's constitutional rights." *Id.* at ___, *3. We promptly rejected that argument, holding that

> an inmate "may bring a[n] . . . action [under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 40[3] U.S. 388[, 91 S.Ct. 1999, 29 L.Ed.2d 619] (1971),] against individual officers for a[n] alleged constitutional violation, but he may not bring an action against the United States, the [Bureau of Prisons, or its] officers in their official capacities as such claims are barred by the doctrine of sovereign immunity."

Id. (some alterations in original) (internal quotation omitted). Contrary to the reasoning in *Santos,* the majority's wholehearted invocation of *Sutton*'s *dictum* reads much of the discretionary function exception out of the federal code.

Under the majority's view, the United States may be liable for conduct even where its officers cannot be. This turns *Bivens* on its head. In *Meyer*, 510 U.S. at 485, the Court explained that it had "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." In light of *Meyer,* it makes no sense to treat FTCA claims against the United States more liberally than we treat *Bivens* actions against individual federal officers, but that is exactly what the majority's holding means: Because of qualified

immunity, *Bivens* at least requires that constitutional rights be "clearly established" before liability ensues against federal officers, *see, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), but the majority's novel liability scheme against the United States apparently does not so require, because it reverses the district court without even pointing to what *clearly established* rights could have been violated under the facts Castro pleaded.[3]

Even if the Border Patrol violated R.M.G.'s constitutional rights, it did not violate any clearly established right.[4] Thus, even assuming that we should narrow the scope of the discretionary function exception so that it does not apply where the Constitution has been violated – a holding that would allow nearly every *Bivens* action also to be an action against the United States, contrary to *Meyer* – there has to be a limit. Before subjecting the United States to suit, at a minimum we ought to require that the

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[3] The majority is confused on this point. Quoting a district court, it states that the constitutional mandate must be "specific and intelligible." It then summarily states that "[w]e hold that Castro's complaint does sufficiently allege that the Border Patrol Agents' actions exceeded the scope of their authority." The majority does not explain, however, how a reasonable agent could have known that his conduct was violating a "specific and intelligible" constitutional mandate when he was exercising his discretion.

[4] Castro alleges that R.M.G.'s clearly established Fourth Amendment right to be free from unreasonable seizure was violated, but it is not clearly established that leaving a minor with his parent, in the absence of any court order dictating otherwise, is an unreasonable seizure.

constitutional "mandate" be clearly established with particularity, something that cannot be shown here.[5]

II. No Constitutional or Statutory Rights Were Violated.

Even if one accepts the majority's erroneous understanding of sovereign immunity, the district court was correct to dismiss for lack of subject-matter jurisdiction, because no constitutional rights were violated. The notion that the Border Patrol agents unconstitutionally "placed in custody" or "detained" R.M.G., a baby less than one year old, is false on its face. We routinely allow parents to make decisions that affect their children's constitutional rights,[6] and it is not contested that Gallardo consented to R.M.G.'s being taken with him to the Border Patrol station, just

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[5] The concern that constitutional rights at least be clearly established before the United States can be liable is in line with the direction taken in *Nurse v. United States,* 226 F.3d 996, 1002 n. 2 (9th Cir. 2000), which expressly reserved the issue: "[W]e do not make any decision regarding the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor."

[6] Indeed, parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights. *See, e.g., Roe v. Tex. Dep't of Protective & Regulatory Servs.,* 299 F.3d 395, 407-08 (5th Cir. 2002) (holding that a social worker must demonstrate probable cause and obtain a court order, *obtain parental consent,* or act under exigent circumstances to justify the visual body cavity search of a juvenile in the residence); *Dubbs v. Head Start, Inc.,* 336 F.3d 1194, 1207 (10th Cir. 2003) (stating, in deciding whether a government program that gave children physical exams, which included blood tests and examination of genitalia, violated the Constitution, that "if the trier of fact concluded that the parents in this case, on behalf of their minor children, actually consented to the examinations, there would be no Fourth Amendment violation").

as he consented to the baby's going with him to Mexico. This explicit parental consent means that R.M.G.'s constitutional rights were not violated.[7] Make no mistake, she was not arrested, detained, held in custody, or deported – she was with *her father* and with *his consent*.

Castro also claims the agents acted beyond their statutory powers because the Border Patrol was never affirmatively authorized to allow non-citizen parents to consent to bringing their citizen children with them to detention centers and other countries by means of government deportation vehicles. This is equally unavailing, because the power to allow parents to consent to take their children with them is ancillary to the government's power to detain and deport. [8]

To make the matter straightforward, what if both of R.M.G.'s parents were illegal aliens? Would the Border Patrol be forbidden, by a statute or the Constitution, from allowing her parents to consent to take her to the detention center while they waited to be deported? Would the agents be forbidden to allow them to consent to carry her with them on the government transport vehicle to Mexico? To ask these questions is to answer them. Does anyone doubt that

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[7] The majority accurately quotes paragraph 36 of the First Amended Complaint, but that paragraph says nothing to explain what alleged actions were taken in supposed violation of the Constitution. Accordingly, the issue is waived and was properly dismissed. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) (noting that arguments raised for the first time on appeal will not be considered).

[8] Castro acknowledges *some* ancillary powers, such as the power to take R.M.G. to the station in a Border Patrol vehicle.

the Border Patrol is authorized, as part of its discretionary authority, to allow families to stay together while it detains and deports?

The question of what to do with a child who is an American citizen, when one or both parents are not, is part of how the Border Patrol implements our immigration regime's "general provisions," and such difficult decisions are exactly the type that "involv[e] the necessary element of choice and [are] grounded in the social, economic, or political goals of the statute" that the discretionary function exception protects. *Gaubert*, 499 U.S. at 323. It seems that under the majority's view, the Border Patrol violates both constitutional and statutory law when it "detains" a citizen child along with the child's Mexican-national parents, especially when it permits the child's parents to take him with them to Mexico.

Likewise, if we accept the proposition that if Border Patrol agents make a custody determination, they act beyond their statutory authority, Castro's claim should still be dismissed, because the agents did not make a custody determination. Instead, they elected not to interfere with the *status quo* as R.M.G.'s parents had left it. If the government had forcibly taken R.M.G. and given her to Castro, that would be picking Castro over Gallardo; if Castro had R.M.G., and the government physically took R.M.G. and gave her to Gallardo, that would be picking him over Castro. Preserving the *status quo,* however, was not making a custody determination, but instead was merely respecting the parents' private ordering.[9]

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[9] Nor did the government make a *de facto* custody determination, a doctrine recognized in another context in *Suboh*

In fact, it is the majority that now makes an *ex post* custody determination by establishing the rule that custody of a child born to an American citizen and an illegal alien is presumptively granted to the American-citizen parent. That may be a fine default rule, but it is not for a federal court of appeals to delve into family law, traditionally the exclusive province of the states. [10]

Furthermore, because this new custody rule does not actually affect Castro but will affect prospective custody determinations, it is more akin to a policy. And when state custody law is silent, the relevant state agency says it will not get involved, and the Border Patrol is confronted with a custody matter and decides to retain the *status quo* as the parents left it, it is not the role of the federal courts to second-guess and decide which policy is best. Castro alleges the Border Patrol acted without authority and rendered a *de facto* custody determination, but in fact it is the majority that acts without authority and announces a *de jure* custody policy.

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v. Dist. Attorney's Office, 298 F.3d 81 (1st Cir. 2002). The agents had to do *something* with R.M.G.; they called the Texas Department of Family and Protective Services, which responded that it "would not get involved," because R.M.G. was not being abused. The majority acknowledges the dilemma the agents faced.

[10] *See Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber* [*v. Barber*, 62 U.S. 582 (1858)], divests the federal courts of power to issue divorce, alimony, and child custody decrees.").

The agents were faced with the following unfortunate situation: Gallardo was detained; Castro had left the home days before; R.M.G., a baby, could not be left alone; Gallardo wanted R.M.G. to go with him; Gallardo had legal right to R.M.G., and no court order had deprived Gallardo of that right; Castro also wanted to take the child, but she had no court order and thus no superior right; Texas officials expressly said that the state would not take R.M.G., because she was not being abused; Texas law is opaque on what to do when two parents with equal right disagree about where a child should live, but the better reading of Texas law is that the parent with possession is authorized to choose[11]; Gallardo had actual possession of R.M.G., and he wanted her to go with him to Mexico.

In this difficult dilemma, the agents did the best that they could, and the choice they made was the one that least enmeshed the federal government in state custody issues. It is hard to imagine a more appropriate case for invoking the discretionary function exception.

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[11] Castro repeatedly refers to *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), which states the factors that Texas courts consider in deciding custody and which does not expressly include, as a factor, which parent has actual possession. From this Castro argues that possession does not matter under Texas law.

This misses something important. Without first obtaining a court order, the parent seeking custody cannot call the police and require them to transfer possession of the child. In other words, in the absence of an order, Texas *does* recognize the *status quo*, at least as to whether the formal power of the state will be exercised.

III. Conclusion.

No one is pleased that Castro did not see her daughter for three years,[12] but as a legal matter, the discretionary function exception applies. The first prong of *Gaubert* was satisfied, because the Border Patrol agents' decisions were "the product of judgment or choice." *Gaubert,* 499 U.S. at 322. The choices made, moreover, were constitutional, because R.M.G. was neither unlawfully detained nor deported, but instead was properly held by her father's consent. The second prong of *Gaubert* was also satisfied, because the agents' decisions were not of the sort that should be "second-guess[ed]," *id.* at 323, given that the question of what to do with a citizen child when the parent with possession is deported, and state and federal law are silent, is a policy matter best left to the agency. Faced with a bad situation, the agents decided to retain the *status quo* as between the parents.

Because the district court was correct to dismiss for lack of subject-matter jurisdiction based on the discretionary function exception, I respectfully dissent.

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[12] If the Border Patrol agents had taken possession from Gallardo, the facts would have been hard, too; it is unfair to a father to say that he must leave his daughter merely because his wife is a citizen and he is not. Faced with a Solomon-splitting-the-baby situation, the agents decided to leave matters as the parents had left them.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI DIVISION

Civil Action No. C-06-61

MONICA CASTRO et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

February 9, 2007, Decided
February 9, 2007, Filed

OPINION BY: Janis Graham Jack

OPINION

ORDER

On this day came on to be considered the United States' motion to dismiss for lack of subject matter jurisdiction, as well as the United States' motion for summary judgment (D.E. 29, 30).[1] For the reasons set

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[1] The United States filed a single document (D.E. 29, 30 (the same document filed twice)), asking the Court to dismiss Plaintiffs' claims pursuant to *Federal Rule of Civil Procedure*

forth below, the Court GRANTS the United States' motion to dismiss Plaintiffs' tort claims for lack of subject-matter jurisdiction, the Court finds that Plaintiffs' claims for relief under the *Fourth* and *Fifth Amendments to the United States Constitution* are MOOT and are therefore DISMISSED, and the Court finds that Plaintiffs' claim for injunctive relief pursuant to *8 U.S.C. § 1101, et. seq.,* is also MOOT and is hereby DISMISSED.

I. Jurisdiction

The Court has jurisdiction over this action pursuant to *28 U.S.C. § 1331* (federal question) and *28 U.S.C. § 1346(b)(1)* (suit against the United States).

II. Factual Background

The following facts are not in dispute: Plaintiff Monica Castro, a United States citizen, moved with her parents from Corpus Christi, Texas to the Lubbock, Texas area when she was approximately fifteen years old. (PX-E, Attachment to DX-A, Castro Decl., p. 1). Around the time that Ms. Castro was fifteen years old, she met Omar Gallardo, an illegal alien and Mexican national who lived in the same area as Ms. Castro. (DX-A, PX-A, Castro Dep., 12:2-20; Castro Decl., p. 1). When Ms. Castro was sixteen, she and Mr. Gallardo moved in together in a trailer near the trailer rented by Ms. Castro's parents. (Castro Dep., 13:10-24). Ms. Castro became pregnant, and on December 4, 2002, Ms. Castro gave birth to her and

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12(b)(1), and in the alternative, seeking summary judgment on certain of Plaintiffs' claims against the Defendant.

Mr. Gallardo's child, R.M.G. (Castro Dep., 14:3-4; Castro Decl., p. 1). R.M.G., a United States citizen, was born at the University Medical Center in Lubbock, Texas. (DX-J, PX-V, Certificate of Birth). Ms. Castro was seventeen at the time of R.M.G.'s birth.[2]

Ms. Castro and Mr. Gallardo had a history of arguing with one another. (Castro Dep., 27: 4-9; DX-H, PX-U, Gallardo Dep., 13:2- 10). Ms. Castro now maintains that Mr. Gallardo abused Ms. Castro during the course of their relationship, although Ms. Castro did not inform her parents or law enforcement authorities of this abuse. (Castro Dep., 22:2-23:24, 27:10-12; Castro Decl., pp. 1-2; DX-B, Rodriguez Dep., 8:24-9:4; DX-C, PX-W, Cendy Castro Dep., 15:13-21, 16:12-19). Ms. Castro maintains that Mr. Gallardo was a good father to R.M.G., and that he never abused his daughter. (Castro Dep., 32:24-25, 39:18-40:17, 86:3-10, 99:13-15).

On November 28, 2003, Ms. Castro and Mr. Gallardo got into an argument. (Castro Decl., 2). Ms. Castro called her grandparents, who also lived in the

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[2] Ms. Castro and Mr. Gallardo may have had a common-law marriage in Texas. There is some dispute as to whether Ms. Castro and Mr. Gallardo had a legally established common-law marriage as of the time of R.M.G.'s birth. In Plaintiffs' response to the United States' motion (D.E. 34), Plaintiffs maintain that Ms. Castro could not have agreed to a common-law marriage until her 18th birthday, which was on April 30, 2003, after R.M.G. was born. (*Id.*). Regardless, there is no dispute that Mr. Gallardo is R.M.G.'s father, both Mr. Gallardo and Ms. Castro are in agreement that R.M.G. is Mr. Gallardo's biological child. (Castro Decl., p. 3; PX-B, Sanchez Decl., p. 2; DX-H, PX-U, Gallardo Dep., 23:24, 25:3-6; Certificate of Birth).

Lubbock area, to come and pick her up at the trailer she shared with Mr. Gallardo and R.M.G. (Castro Dep., 28:9-12; Castro Decl., p. 2). Ms. Castro's grandparents arrived to pick her up on November 29, 2003. (Castro Dep., 29:10-21). Ms. Castro left the trailer with her grandparents, and R.M.G. remained with Mr. Gallardo. (Castro Dep., 30:11-22; Castro Decl., pp. 2-3). Immediately thereafter, Ms. Castro commenced efforts to recover R.M.G. from Mr. Gallardo. (Castro Dep., 30:20-25; Castro Decl., p. 3). Ms. Castro contacted the Lubbock County Sheriff's Department, Texas Child Protective Services, and the Lubbock Police Department regarding the situation with R.M.G. (Castro Dep., 30:20-25, 45:7-11; Castro Decl., p. 3; PX-R, Sanchez Mem., p. 1). The agencies told Ms. Castro that since Ms. Castro and Mr. Gallardo were married (pursuant to a common-law marriage), and because Mr. Gallardo was the child's father, that Mr. Gallardo had as much right to R.M.G. as did Ms. Castro.[3] (Castro Dep., 31:24-32:10; Rodriguez Dep., 11:25-12:12; Castro Decl., p. 3). Ms. Castro was told that her issues with Mr. Gallardo constituted a civil dispute, and Ms. Castro would have to hire a private attorney to seek a custody order. (Castro Dep., 31:24-32:10; Castro Decl., p. 3). Child Protective Services did tell Ms. Castro that she could come fill out an application to start the process for obtaining assistance from Child Protective Services. (Castro Dep., 32:8-16). Child Protective Services told

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[3] As noted above, Ms. Castro and Mr. Gallardo may have had a common-law marriage in Texas. This Court makes no determination as to whether or not Ms. Castro and Mr. Gallardo were legally married at the time of the events in question.

Ms. Castro that this process would take one to two days. (Castro Dep., 32:11). Ms. Castro did not fill out the application, because she said she did not want to wait the one to two days. (Castro Dep., 32:17-23).

On December 1, 2003, Ms. Castro, along with her aunt Sophia Rodriguez, went to the Lubbock Border Patrol station to report Mr. Gallardo as an illegal alien. (Castro Dep., 35:9-23; Castro Decl., p. 3; Rodriguez Dep., 10:4-16; DX-D, Sanchez Decl., p. 1; PX-B, Sanchez Dep., 114:2-117:14; Sanchez Mem., p. 1). They spoke with Border Patrol Agent Manuel Sanchez. (Castro Dep., 35:9-23; Sanchez Decl., p. 1; Sanchez Mem., p. 1; Castro Decl., p. 3). Ms. Castro informed Agent Sanchez that R.M.G. was currently with Mr. Gallardo, and that Ms. Castro was seeking to recover R.M.G. from Mr. Gallardo.[4] (Castro Dep., 39:3-6; Rodriguez Dep., 10:20-11:1; Sanchez Decl., p. 1; Sanchez Mem., p. 1; DX-F, Kurupas Decl., pp. 1-2; Sanchez Dep., 114:4-9). At this initial meeting, Agent Sanchez informed Ms. Castro that she needed to get a court order for temporary custody of R.M.G. (Sanchez Dep., 115:24-116:6). Agent Sanchez asked Ms. Castro to be present when Border Patrol went to the trailer to apprehend Mr. Gallardo and certain of his illegal alien relatives. (Castro Dep., 41:1-23, 96:3-6; Castro Decl., p. 3; Rodriguez Dep., 11:6-12; Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2). Agent Sanchez informed Ms. Castro that if she were present, Border Patrol could question everyone regarding their

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[4] Of note, Mr. Sanchez also informed Ms. Castro that Amarillo law enforcement authorities wanted to question Mr. Gallardo as a possible witness in connection with a homicide. (Castro Dep., 35:23-36:10, 39:7-17).

citizenship and then leave R.M.G. with Ms. Castro, since she both Ms. Castro and R.M.G. are United States citizens. (Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2; Sanchez Dep., 130:13-25, 142:9-13, 151:16-24). However, Ms. Castro did not wish to be present at the time Border Patrol apprehended Mr. Gallardo and his relatives, Ms. Castro maintained that she was scared of what Mr. Gallardo and his family would do to her, and she did not want to be present when Border Patrol arrived. (Castro Dep., 41:1-23; Sanchez Decl., p. 3; Sanchez Mem., p. 2). Accordingly, Ms. Castro was not present when Border Patrol arrived in the morning of December 3, 2003 at the trailer that Ms. Castro had shared with Mr. Gallardo. (Castro Dep., 58:25-59:25; Castro Decl., p. 3; Sanchez Decl., p. 4). Rather, Ms. Castro watched the events unfold from her relatives' trailer across the street. (Castro Dep., 58:25-59:25; Castro Decl., p. 4).

Border Patrol took Mr. Gallardo, three of his brothers and his cousin to the Lubbock Border Patrol station. (Sanchez Decl., p. 4; Sanchez Mem., p. 3; Kurupas Decl., p. 1; Galladro Dep., 15:4-20). Mr. Gallardo had R.M.G. with him, so R.M.G. also went to the station. (Kurupas Decl., p. 1; Sanchez Mem., p. 3; Gallardo Dep., 17:13-17). Mr. Gallardo, R.M.G. and Mr. Gallardo's relatives remained in a holding cell at the station. (Sanchez Dep., 160:11- 161:7; PX-C, Crump Dep., 64:6-7).

Shortly thereafter Ms. Castro also arrived at the station, and she requested that her daughter be returned to her rather than remaining with Mr. Gallardo. (Castro Dep., 63:14-65:25; Castro Decl., pp. 4-5; PX-M, Kurupas Dep., 94:24-25, 96:3-11). However,

Mr. Gallardo informed Border Patrol that Ms. Castro had walked out on him and R.M.G., and he wanted R.M.G. to remain with him. (Sanchez Decl., pp. 4-5; Sanchez Mem., p. 3; Kurupas Decl., p. 2). At the direction of Agent in Charge Greg Kurupas, Agent Sanchez contacted the Texas Department of Family and Protective Services in Lubbock ("DFPS"), to inquire as to R.M.G. (Sanchez Decl., p. 5; Sanchez Mem., p. 3; DX-E, Perkins-McCall Decl., p. 1; Kurupas Decl., p. 2; Kurupas Dep., 98:4-11). DFPS asked if R.M.G. appeared as if she had been abused. (*Id.*). Agent Sanchez responded in the negative, he said that R.M.G. appeared to be well taken care of and in good health. (*Id.*). DFPS informed Agent Sanchez that given the circumstances, if the child was not abused or in any danger, they would not get involved. (*Id.*).

Border Patrol processed Mr. Gallardo and his relatives and prepared to repatriate them back to Mexico. (Sanchez Dep., 159:23- 160:7, 163:5-164:8, 181:15-162:8). The transport to Mexico from Lubbock left by 3:15 each day, so Border Patrol planned to send Mr. Gallardo and his relatives by that time. (Sanchez Dep., 86:11-21).

Around 1:30 in the afternoon, Ms. Castro and her relatives engaged an attorney, Lina Trevino, to obtain a temporary custody order of R.M.G. for Ms. Castro. (Castro Dep., 67:16-25, 69:10-17, 73:20-75:15; Castro Decl., p. 5). Ms. Trevino drafted the necessary paperwork and proceeded to the courthouse to obtain a Judge's signature on the order. (Castro Dep., 75:2-23; Castro Decl., p. 5; PX-H, Trevino Dep., 16:2-6; 18:14-20:9). However, Ms. Trevino never filed any documents with the state court, rather Ms. Trevino intended to

wait for a Judge's signature and then later file the papers. (Trevino Dep., 18:14-25). Ms. Trevino called Border Patrol Agent in Charge Greg Kurupas to inform him that she was working on obtaining a Judge's signature on a temporary custody order. (Kurupas Decl., pp. 2-3; Castro Dep., 75:17-76:3; Trevino Dep., 16:9-18:12, 20:10-21:8). Agent Kurupas told Ms. Trevino that the repatriation transport had to leave by 3:15 p.m. (Kurupas Decl., p. 2; Exh. 1 to Kurupas Decl., Repatriation Agreement; Trevino Dep., 20:10-21:8). By the time the repatriation transport left Lubbock, Ms. Trevino was not able to obtain a Judge's signature on the temporary custody order. (Castro Dep., 76:4-7; Castro Decl., p. 5; Trevino Dep., 21:9-22:2). Ms. Trevino did not file any papers regarding custody of R.M.G., and she did not further pursue a custody order for Ms. Castro. (Trevino Dep., 23:10-24:22).

The repatriation transport vehicle left Lubbock around 3:15 on December 3, 2003, with Omar Gallardo on board with his and Ms. Castro's daughter R.M.G. (Kurupas Decl., p. 3).

Shortly after Mr. Gallardo and R.M.G. went to Mexico, Ms. Castro returned to live with her parents in Corpus Christi. (Castro Dep., 77:12-16; Castro Decl., p. 5).

In September, 2006, Mr. Gallardo was detained in the Amarillo area on charges of illegal re-entry (8 U.S.C. § 1326(a) (1)).[5] While Mr. Gallardo was in

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[5] Case No. 2:06-cr-00068, United States District Court for the Northern District of Texas, Amarillo Division, assigned to the Hon. Mary Lou Robinson. Mr. Gallardo pled guilty to the offense

custody, Mr. Gallardo and Ms. Castro came to an agreement whereby R.M.G., who was living in Mexico with Mr. Gallardo's parents, would be returned to the custody of Ms. Castro. (Galladro Dep., 44:10-24; DX-J, Stipulation Agreement). R.M.G. was returned to Ms. Castro's custody on December 1, 2006.

III. Procedural Background

Ms. Castro filed the instant case on February 10, 2006, on her own behalf and as next friend of her daughter R.M.G. (together, "Plaintiffs") (D.E. 1). In Plaintiffs' original Complaint, Plaintiffs sought monetary damages and injunctive relief pursuant to the Fourth, Fifth and Tenth Amendments to the United States Constitution, and Plaintiffs also brought claims against the United States for negligence, intentional infliction of emotional distress, and false imprisonment (pursuant to the Federal Tort Claims Act). Pursuant to a motion to dismiss filed by the United States (D.E. 17), this Court dismissed Plaintiffs' constitutional claims for monetary relief, as such claims "are barred by the doctrine of sovereign immunity." (D.E. 26, p. 2). Plaintiffs filed their First Amended Complaint ("Amended Complaint") on May 19, 2006 (D.E. 22). In their Amended Complaint, Plaintiffs assert claims for injunctive relief under the Fourth and Fifth Amendments to the United States Constitution, as well as claims for negligence,

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and on December 19, 2006, Mr. Gallardo was sentenced to ninety days in the custody of the Federal Bureau of Prisons, with credit for time served since September 21, 2006. (D.E. 34, 35, 36, Case No. 2:06-cr-00068, United States District Court for the Northern District of Texas).

intentional infliction of emotional distress, false imprisonment, abuse of process, and assault (pursuant to the Federal Tort Claims Act). (Amended Complaint, ¶¶ 28-43, 54-77). Plaintiffs also assert a claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, et. seq.[6] (*Id.* at pp. 44-49).

The United States filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (1), and in the alternative, motion for summary judgment, on November 14, 2006 (D.E. 29, 30). The United States argues that this Court does not have subject matter jurisdiction over Plaintiffs' tort claims against the Defendant, because they are barred by the discretionary function exception to the Federal Tort Claims Act. In the alternative, the United States also argues that Defendant is entitled to summary judgment on Plaintiffs' tort claims against the United States (for negligence, intentional infliction of emotional distress, false imprisonment, abuse of process and assault). The United States has offered evidence in support of its motion, including excerpts from the depositions of Plaintiff Monica Castro, Ms. Castro's mother Cendy Castro, and Ms. Castro's Aunt Sophia Rodriguez, as well as Declarations from Border Patrol Agents Manuel Sanchez and Greg Kurupas. (*See* D.E. 29, Attachments, DX-A to DX-K).[7]

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[6] Defendant's motion does not address Plaintiffs' claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, *et. seq.*

[7] Defendant also filed a reply brief in support of its motion (D.E. 35). Defendant did not file a motion seeking permission to file its reply brief, as is required by the Court's Scheduling Order in this case. (D.E. 11, Scheduling Order, P4 ("No reply to the

Plaintiffs filed their response to the United States' motion on January 13, 2007 (D.E. 34).[8] Plaintiffs argue that the discretionary function exception to the Federal Tort Claims Act does not apply in this case, and that there are factual issues that preclude summary judgment on Plaintiffs' tort claims against the United States. Plaintiffs have submitted evidence in support of their response, including excerpts of the depositions of Plaintiff Monica Castro, Attorney Lina Trevino, and Border Patrol Agents Manuel Sanchez, Andrea Crump and Greg Kurupas. (*See* D.E. 34, Attachments, PX-A to PX-Z).

IV. Discussion

A. Standard for 12(b)(1) Motions to Dismiss

"Motions filed under Rule 12(b) (1) of the Federal Rules of Case 2:06-cv-00061 Document 39 Filed 02/09/2007 Page 12 of 28 Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see also* Fed. R. Civ. P. 12(b) (1). A court may find lack of subject

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opposition to a motion will be filed by movant without leave of Court on good cause")). However, in the interests of justice, the Court will treat Defendant's reply as if Defendant had filed the required motion for leave to file a reply brief, and the Court will consider Defendant's reply brief in determining whether to grant or deny Defendant's motion.

[8] The Court granted Plaintiffs' request for an extension of time to respond to the Defendant's motion (D.E. 32). Plaintiffs' response was due on January 15, 2007. (D.E. 33).

matter jurisdiction "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (internal citations omitted). "The burden of proof for a Rule 12(b) (1) motion to dismiss is on the party asserting jurisdiction." *Ramming*, 281 F.3d at 161; *see also McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995) ("On a 12(b) (1) motion, challenging the jurisdiction of the court, the burden lies with the party invoking the court's jurisdiction").

"A motion under 12(b) (1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998); *see also Trans-Serve, Inc. v. United States*, 2003 U.S. Dist. LEXIS 24245, 2003 WL 23269560, *2 (W.D. La. 2003) ("Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief."); *Russell v. Choicepoint Servs., Inc.*, 302 F.Supp.2d 654, 658 (E.D. La. 2004) (same).

B. Plaintiffs' Tort Claims Are Barred by the Discretionary Function Exception to the Federal Tort Claims Act

1. Sovereign Immunity and the Federal Tort Claims Act

"[T]he United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Hebert v. United States*, 438 F.3d 483, 487 (5th Cir. 2006); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued") (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)). Sovereign immunity is jurisdictional in nature. See *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Such immunity protects the United States from liability, and deprives the court of subject-matter jurisdiction over claims against the United States. See *Hebert*, 438 F.3d at 487-88 (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Thus, before a court proceeds on a case against the United States, it "must first decide whether one of the government's several waivers of sovereign immunity applies." *Truman*, 26 F.3d at 594.

The Federal Tort Claims Act provides consent for suit against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); see also *Johnston v. United States*, 85 F.3d 217, 218-19 (5th Cir. 1996); *Truman*, 26 F.3d at 594 ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its

agents who act within the scope of their employment").[9]

2. Discretionary Function Exception to the Federal Tort Claims Act

The "discretionary function" exception to the Federal Tort Claims Act provides that the United States is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of

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[9] Of note, there is an exception to the Federal Tort Claims Act, which provides that the Act does not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). However, the Federal Tort Claims Act's waiver of immunity still applies to allow a plaintiff to proceed on claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution if the actions complained of are "acts or omissions of investigative or law enforcement officers of the United States Government." *Id.*; *see also Jeanmarie v. United States*, 242 F.3d 600, 603-04 (5th Cir. 2001); *Cross v. United States*, 159 Fed. Appx. 572, 576 (5th Cir. 2005). This law enforcement proviso of 28 U.S.C. § 2680(h) applies to Plaintiffs' assault, abuse of process and false imprisonment claims against the Defendant. This is because the actions Plaintiffs complain of were those taken by Border Patrol Agents, and Border Patrol Agents are federal law enforcement officers for purposes of the Federal Tort Claims Act. See *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that Border Patrol Agents are federal law enforcement officers for the purposes of the law enforcement proviso of 28 U.S.C. 2680(h)); *Sanchez v. Rowe*, 651 F. Supp. 571, 573 (N.D. Tex. 1986) (finding that a Border Patrol Agent is "a law enforcement officer within the meaning of the FTCA"). *United States v. Ortiz*, 422 U.S. 891, 906, (1975) ("The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers").

a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see also United States v. Gaubert*, 499 U.S. 315, 322 (1991). "The exception only covers acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *Gaubert, 499 U.S. at 322* (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984); see also *ALX El Dorado, Inc. v. Southwest Sav. & Loan Ass'n*, 36 F.3d 409, 411-12. (5th Cir. 1994) ("In determining whether the discretionary function exception bars a suit against the government, the focus of the inquiry is on the nature of the action taken and on whether that action is subject to policy analysis.").

In *Gaubert*, the Supreme Court established a two-prong test in order to determine when the discretionary function exception applies to a plaintiff's claim.

> For the exception to apply, the first prong requires that the challenged governmental action be the product of judgment or choice. Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however, the governmental action is considered discretionary and the first prong is satisfied.

> The second prong requires that the judgment or choice be based on considerations of public policy. Under this prong, we determine whether the judgment is grounded in social, economic, or political policy. If the judgment of the governmental official is based on any of these. policy considerations, then the discretionary function exemption applies and the claim is barred.

Garza v. United States, 161 Fed. Appx. 341, 344 (5th Cir. 2005) (internal citations omitted); *see also Theriot v. United States*, 245 F.3d 388, 397 (1998) (citing *Gaubert*, 499 U.S. at 322-24) (For the discretionary function exception to apply, '[f]irst, the conduct must be discretionary in nature, that is it must 'involv[e] an element of judgment or choice.' Second, the judgment or decision must be grounded on considerations of social, economic, or political public policy."). This second prong has also been classified as encompassing conduct that the "discretionary function exception was designed to shield." *Tremblay v. United States*, 261 F. Supp.2d 730, 734 (S.D. Tex. 2003) (citing *Berkovitz*, 486 U.S. at 536).

3. The Border Patrol Agents' Actions Were the Product of Judgment or Choice

The first prong of the *Gaubert* test requires that the challenged governmental action be the product of "judgment or choice." *Gaubert*, 499 U.S. at 322. This prong is not satisfied if a statute, regulation, or policy mandates a specific course of action. *See Garza*, 161 Fed. Appx. at 344. For the reasons set forth below, the Border Patrol Agents' decision to let R.M.G.

accompany her father back to Mexico was the product of a judgment or choice, and the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy.

a. Actions of Ms. Castro Led to Difficult Choice for the Border Patrol Agents

Ms. Castro left R.M.G. in the trailer with Mr. Gallardo on November 29, 2003, and immediately thereafter she contacted the Lubbock County Sheriff's Department, the Lubbock Police Department, and Texas Child Protective Services regarding her situation. (Castro Dep., 30:20-25, 45:7-11; Castro Decl., p. 3; Sanchez Mem., p. 1). All of these agencies told Ms. Castro that in order for her daughter to be returned to her from Mr. Gallardo, **Ms. Castro would have to obtain an order granting her custody of R.M.G.** (Castro Dep., 31:24-32:10; Rodriguez Dep., 11:25-12:12; Castro Decl., p. 3). However, even after receiving this information, Ms. Castro took no action regarding a custody order. (*Id.*). Rather, Ms. Castro waited two days, until December 1, 2003, and then she elected to go to the Border Patrol to report Mr. Gallardo as an illegal alien.[10] (Castro Dep. 35:9-23;

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[10] The Court notes that Child Protective Services also told Ms. Castro that she could come fill out an application that would allow Child Protective Services to help her. (Castro Dep., 32:8-16). Ms. Castro was told that this process would take one to two days. (Castro Dep., 32:11). Ms. Castro decided not to go to Child Protective Services to fill out the application, because she did not want to wait 'the one to two days, she said "I wanted my daughter already." (Castro Dep., 32:17-23). However, for an unknown reason, Ms. Castro waited two days regardless, and then she chose to go to the Border Patrol to report Mr. Gallardo.

Castro Decl., p. 3; Rodriguez Dep., 10:4-16; Sanchez Decl., p. 1; Sanchez Dep., 114:2-117:14). Ms. Castro spoke with Border Patrol Agent Sanchez, who also told Ms. Castro that she needed to obtain a temporary custody order of R.M.G. (Sanchez Dep., 115:24-116:6). Agent Sanchez also asked Ms. Castro to be present when Border Patrol arrived to arrest Mr. Gallardo and his relatives. (Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2; Sanchez Dep., 130:13-25; 142:9-13; 151:16-24). As noted above, the purpose of having Ms. Castro present was so Border Patrol could do a citizenship check at the time they apprehended Mr. Gallardo and his relatives, and Border Patrol could then leave R.M.G. with Ms. Castro because they were both United States citizens. (*Id.*). This would have prevented R.M.G. from going to the Border Patrol station with Mr. Gallardo. (*Id.*). However, Ms. Castro chose not to be present at the arrest of Mr. Gallardo and his relatives, rather Ms. Castro watched the events unfold from a nearby relatives' trailer home. (Castro Dep., 41:1-23, 58:25-59:25; Castro Decl., p. 3; Sanchez Decl., pp. 3-4; Sanchez Mem., p. 2). Since Ms. Castro was not present at the arrest, R.M.G. traveled to the Border Patrol station with her father. (Kurupas Decl., p. 1; Sanchez Mem., p. 3; Gallardo Dep., 17:13-17). Moreover, even though Mr. Gallardo and R.M.G. were taken to the Border Patrol station very early in the morning, Ms. Castro waited until approximately 1:30 p.m. to meet with attorney Lina Trevino to begin the process of obtaining a custody order. (Trevino Dep., 9:18-22). Ms. Trevino never actually filed a state court

suit regarding R.M.G., rather Ms. Trevino went to the courthouse to try to obtain a Judge's signature, with the intention of filing the required papers after the signature was obtained. (Trevino Dep., 18:14-25). When Ms. Trevino was not able to obtain a Judge's signature on the temporary custody order before the repatriation transport left for Mexico, Ms. Trevino did not further pursue a custody order on Ms. Castro's behalf. (Trevino Dep., 23:10-24:22).

The end result of all of these actions is that Ms. Castro had no custody order granting her even temporary custody of R.M.G., even though she had had several days to obtain such an order. A court case regarding R.M.G. had not even been filed at the time R.M.G. accompanied her father into Mexico. Given these circumstances, the Border Patrol Agents were faced with an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico.

b. Border Patrol Agents' Actions Were Not Directed by Statute, Policy or Regulation

As a result of the circumstances described above, the Border Patrol was left without a "good" option with a wholly positive outcome. However, there was no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation.[11] (DX-F, Smietana Decl., ¶¶ 3-4).

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[11] The Court notes that Defendant has submitted evidence that:

In this case, there was no custody order in favor of Ms. Castro, no court case had been filed, R.M.G. was with her father Mr. Gallardo, and Mr. Gallardo was, not willing to relinquish possession of his child. Given the circumstances, Border Patrol Agents made the decision not to forcibly remove the child from Mr. Gallardo, and they let R.M.G. go with Mr. Gallardo to Mexico. There was no statute, regulation or policy mandating that Border Patrol should have taken another course of action, *i.e.*, removing R.M.G. from Mr. Gallardo and giving her to Ms. Castro, or removing R.M.G. from Mr. Gallardo and attempting to place her in protective custody. (*Id.*). The Court does not today condone the Border Patrol's actions or the choices it made on that day. However, [] there is no statute, regulation or policy that would have mandated that the Border Patrol take another course of action on December 3, 2003. (*Id.*).[12]

> [T]here are no policies, rules or statutes governing the apprehension and detention of a foreign national in lawful custody of his or her U.S. juvenile child . . . There are no mandatory federal statutes, regulations or policies prescribing the actions of a Border Patrol Agent when he or she encounters a foreign national with lawful custody of his or her minor, U.S. citizen child with respect to the minor child.

(Smietana Decl., ¶ 3). Plaintiffs agree with this statement in their Response to Defendant's motion. (Response, p. 9, stating that "[b]y Defendant's own admission" there are no policies, rules or statutes that apply in the above-described situation).

[12] Further, the Court notes that contrary to Plaintiffs' argument in their response, R.M.G. was not technically "deported" by the Border Patrol. (Response, pp. 9-10). When R.M.G. went to Mexico with her father, she was legally free to

c. Border Patrol Did Not Make a "Custody Determination" as to R.M.G.

Plaintiffs' main argument is that in letting R.M.G. go with her father to Mexico, the Border Patrol Agents made an "impermissible custody determination" in favor of Mr. Gallardo. (Response, p. 15). Plaintiffs' argument is unpersuasive, because the same holds true for the reverse: accepting Plaintiffs' argument as true, if the Border Patrol had forcibly removed R.M.G. from Mr. Gallardo so as to place her with her mother, the Border Patrol Agents would also be making an "impermissible custody determination" in favor of Ms. Castro.[13] The Border Patrol Agents did not actually make any "custody determination" on December 3, 2003. The Border Patrol issued no custody order and made no determination that R.M.G. should remain permanently with either her mother or her father.[14]

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return to the United States, unlike someone who has been legally deported from this country. In fact, R.M.G. did return to the United States on December 1, 2006, to live with Ms. Castro.

[13] The Court notes that Plaintiffs state in their response that "Absent court orders to the contrary, parents have equal rights regarding their children." (Response, p. 16) (emphasis in original). In this case, as of December 3, 2003, there was no court order granting either Mr. Gallardo or Ms. Castro custody of R.M.G. Accordingly, both parents had equal rights to the child. Plaintiffs argue that Border Patrol made a custody determination for Mr. Gallardo by leaving R.M.G. with her father, but Plaintiffs do not state how the situation would be any different if Border Patrol had forcibly removed R.M.G. from Mr. Gallardo and placed her with Ms. Castro – since, as Plaintiffs admit, Mr. Gallardo and Ms. Castro had "equal rights" to R.M.G. (Response, p. 14).

[14] The Court notes that if Texas is a child's "home state," it is the Texas state courts that have jurisdiction to make an initial

Rather, regardless of whether R.M.G. went with Mr. Gallardo to Mexico or whether she remained with Ms. Castro in Texas, the other parent still had legal parental rights ***and was free to seek a court custody order at a later date.*** In fact, that is exactly what Ms. Castro did, and R.M.G. returned to live with Ms. Castro on December 1, 2006. (Response, p. 7).

d. Border Patrol's Decision Satisfies the First Prong of the *Gaubert* Test

Based on the above, the Border Patrol Agents' decision to allow R.M.G. to remain with her father when he was repatriated to Mexico satisfies the first prong of the Gaubert test. See *Gaubert*, 499 U.S. at 322. The Border Patrol had given Ms. Castro an opportunity to be present at the time of the arrest, and Agent Sanchez told Ms. Castro that if she were present, R.M.G. would have remained with Ms. Castro rather than being transported to the Border Patrol station. It was Ms. Castro's decision not to be present at the time of the arrest, and it was Ms. Castro's decision not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico. Without a

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child custody determination. Tex. Fam. Code 152.201; *see also Powell v. Stover*, 165 S.W.3d 322, 325, 48 Tex. Sup. Ct. J. 780 (Tex. 2005); *In re S.R.T.*, 2006 Tex. App. LEXIS 1395, 2006 WL 397946, *1 (Tex. App–San Antonio 2006). A child's "home state" is defined as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Tex. Fam. Code § 152.102(7). Texas was R.M.G.'s home state as of the date of the events in question in this case. (Castro Dep., 20:2-21; Cendy Castro Dep., 16:23-17:1).

custody order and with R.M.G. in her father's possession at the Border Patrol Station, the Border Patrol Agents were left to make a difficult decision, one that was a product of a judgment or choice, and one that was not regulated by any statute, policy or regulation mandating a specific course of action.

4. The Border Patrol's Actions Also Satisfy the Second Prong of the *Gaubert* Test

The second prong of the Gaubert test asks whether the challenged "judgment or decision must be grounded on considerations of social, economic, or political public policy." *Theriot*, 245 F.3d at 397 (internal citations omitted). "[T]he pertinent inquiry on the 'policy analysis' prong of the [Gaubert] discretionary function exception inquiry is not whether the discretionary act at issue involved actual policy analysis but whether the act was '***susceptible to policy analysis.***" *Bragg v. United States*, 55 F. Supp.2d 575, 584 (S.D. Miss. 1999) (internal citations omitted) (emphasis added); *Baldassaro v. United States*, 64 F.3d 206, 211 (5th Cir. 1995) (internal citations omitted) ("the appropriate inquiry is whether the act in question is susceptible to policy analysis."); *Andrade v. Chojnacki*, 338 F.3d 448, 457 (5th Cir. 2003) (internal citations omitted) ("the applicability of the discretionary function exception does not turn on evidence of the actual decisions made by the defendants, but, rather, on whether the decision is or is not susceptible to policy analysis"); *Lakomy v. United States*, 70 Fed. Appx. 199, 204 (5th Cir. 2003) (internal citations omitted) ("Second, we examine whether the judgment or decision is grounded on considerations of social, economic, or political public

policy. The exception applies to any judgment or choice that is susceptible to policy analysis.").

In this case, the Border Patrol Agents' decision to allow R.M.G. to accompany Mr. Gallardo to Mexico is a decision that is "susceptible to policy analysis." *Id.* As noted above, on December 3, 2003, there was no custody order granting either Ms. Castro or Mr. Gallardo custody of R.M.G, and the Border Patrol Agents were not mandated to act in a certain way pursuant to a statute, regulation or policy. (Smietana Decl., ¶¶ 3-4). Rather, the Border Patrol Agents had to make a policy decision as to what to do with R.M.G. The options included (1) forcibly removing R.M.G. from Mr. Gallardo and placing her with Ms. Castro; (2) expending further resources in detaining Mr. Gallardo in Lubbock while Ms. Castro belatedly sought a court custody order; or (3) allowing R.M.G. to accompany her father to Mexico. The Border Patrol Agents chose the third option. The Court today does not hold that this was the optimal course of action. However, the Border Patrol Agents' decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case. *See, e.g.*, *Cazales v. Lecon*, Inc., 994 F. Supp. 765, 767 (S.D. Tex. 1997) ("Policy analysis may include the weighing of competing interests or the examination of economic constraints in light of the needs of the public."); *Baum v. United States*, 986 F.2d 716, 724 (4th Cir. 1993) (a decision as to the best allocation or use of resources is "inherently bound up in considerations of economic and political policy, and

accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second-guessing"). Accordingly, the Court finds that the Border Patrol Agents' decision does meet the second prong of the Gaubert test. See *Baldassaro*, 64 F.3d at 211.

For the reasons set forth above, the Court determines that the Border Patrol Agents' actions satisfy both prongs of the Gaubert test, and the discretionary function exception applies to bar Plaintiffs' tort claims against the United States. See *Gaubert*, 499 U.S. at 322. Accordingly, Defendant's motion to dismiss is hereby GRANTED, and Plaintiffs' tort claims against the United States are DISMISSED for lack of subject-matter jurisdiction.

C. Plaintiffs' Constitutional Claims are Moot

In their Amended Complaint, Plaintiffs assert claims for violation of the Fourth and Fifth Amendments to the United States Constitution. (Amended Complaint, ¶¶ 28-43, First, Second and Third Causes of Action). This Court has already ruled that Plaintiffs cannot seek monetary damages for their constitutional claims, as such claims for monetary relief "are barred by the doctrine of sovereign immunity." (D.E. 26, p. 2). Accordingly, for all of Plaintiffs' constitutional claims in their Amended Complaint, Plaintiffs only seek injunctive relief. (*Id.*; Amended Complaint, ¶¶ 28-43). Specifically, Plaintiffs seek injunctive relief "***in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.***" (*Id.* at ¶¶ 33, 38, 43) (emphasis added).

As noted above, Ms. Castro's daughter R.M.G. was returned to Ms. Castro's custody on December 1, 2006. (Response, p. 7). Accordingly, Plaintiffs' constitutional claims seeking injunctive relief in the form of assistance in locating and returning R.M.G. to Ms. Castro are now MOOT. The Court therefore DISMISSES Plaintiffs' first, second and third causes of action in their Amended Complaint, for violations of the Fourth and Fifth Amendments to the United States Constitution, as MOOT.

D. Plaintiffs' Claim for Injunctive Relief for Violation of 8 U.S.C. § 1101, *et. seq.*, is Moot

In their Amended Complaint, Plaintiffs also allege a claim against the United States for a statutory violation of 8 U.S.C. § 1101, *et. seq.* (Immigration and Nationality Act). Plaintiffs claim that the United States acted in violation of the statute "by detaining and removing a U.S. citizen." (Amended Complaint, ¶ 47, Fourth Cause of Action).

Plaintiffs seek both declaratory and injunctive relief in redress for this claim. Specifically, Plaintiffs seek declaratory relief "in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G." (Amended Complaint, ¶ 49). Plaintiffs also seek injunctive relief, "in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro". (*Id.*). As R.M.G. was returned to Ms. Castro's physical custody as of December 1, 2006, Plaintiffs' request for

injunctive relief is hereby MOOT and is DISMISSED.[15] However, since the Defendant did not raise Plaintiffs' claim for declaratory relief in their motion to dismiss/motion for summary judgment, that claim currently remains pending.

V. Conclusion

For the reasons set forth above, the Court hereby GRANTS Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (1), and Plaintiffs' claims for negligence, intentional infliction of emotional distress, false imprisonment, abuse of process and assault (under the Federal Tort Claims Act) are all hereby DISMISSED for lack of subject-matter jurisdiction. The Court finds that Plaintiffs' constitutional claims for violations of the Fourth and Fifth Amendments to the United States Constitution, as well as Plaintiffs' claim for injunctive relief under 8 U.S.C. § 1101, et. seq., are MOOT, and those claims are therefore DISMISSED. As it was not addressed in Defendants' motion, Plaintiffs' claim for declaratory relief under 8 U.S.C. § 1101, *et. seq.* currently remains pending.

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[15] As noted above, Defendant does not reference Plaintiffs' claim under 8 U.S.C. 1101 in their motion. However, the Court may still *sua sponte* dismiss Plaintiffs' claim for injunctive relief under the statute as moot. *See Berry v. Pierce*, 98 F.R.D. 237 (E.D. Tex. 1983) ("since mootness is a question concerning the fundamental powers of a federal court under Article III, had the Court considered the case moot . . . it would have been obliged to dismiss the case sua sponte.").

SIGNED and ENTERED on this 9th day of February, 2007.

Janis Graham Jack
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

MONICA CASTRO, *For Herself And as Next Friend of* R.M.G., a minor child,	)	United States District Court Southern District of Texas **FILED** **MAY 19 2006** Michael M. Millby, Clerk
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	C.A. No. 2:06-CV-00061
Defendants.	)	

PLAINTIFFS' FIRST AMENDED COMPLAINT

1. Pursuant to Rule 15(a) of the Federal Rules of Civil procedure, Plaintiffs Monica Castro and R.M.G. file this First Amended Complaint.

2. This is a civil action for monetary damages and injunctive and declaratory relief brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.,* 8 U.S.C. § 1101 *et seq.,* the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.,* and the Fourth and Fifth Amendments to the Constitution of the United States. Plaintiff Monica Castro, for herself and as Next Friend of R.M.G., seeks injunctive relief under the U.S. Constitution in the form of assistance from Defendant

United States in locating and returning Plaintiff R.M.G., who was wrongfully deported, to the physical custody of Plaintiff Castro; declaratory relief; and damages arising from acts or omissions of the United States of America.

Jurisdiction and Venue

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question), the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

4. Venue is proper in the United States District Court for the Southern District of Texas because Plaintiff resides in this judicial district and no real property is involved in the action. 28 U.S.C. § 1402(b).

Exhaustion of Administrative Remedies

5. Plaintiffs presented timely administrative claims with the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), pursuant to 28 U.S.C. § 2675(a). Plaintiffs' administrative claims were received by the United States on June 1, 2005.

6. The United States has neither approved nor denied the claims, and more than six months has elapsed since the United States' receipt of the claims. Plaintiffs' suit is timely filed pursuant to 28 U.S.C. § 2675(a).

Parties

7. Plaintiff Monica Castro is a U.S. citizen currently residing in Corpus Christi, Nueces County,

Texas. At the time of the incidents giving rise to this suit, she was a resident of Shallowater, Lubbock County, Texas.

8. Plaintiff Castro appears in this lawsuit as both a plaintiff in her individual capacity and as Next Friend for her daughter, R.M.G., a minor child. At the time of the incidents giving rise to this suit, Plaintiff R.M.G. was a resident of Shallowater, Lubbock County, Texas. Her current residence is unknown.

9. Plaintiff Castro has the authority to act as Next Friend for Plaintiff R.M.G. pursuant to Rule 17(c) of the Federal Rules of Civil Procedure.

10. Defendant United States of America is a sovereign nation and exists under the Constitution of the United States of America and the laws enacted by the United States Congress. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) are, and at all times relevant to this lawsuit were, agencies of the Department of Homeland Security, organized and existing under the laws of the United States.

Statement of Facts

11. Plaintiff R.M.G. is a three-year-old U.S. citizen. She is the daughter of Plaintiff Monica Castro, a U.S. citizen, and of Omar Gallardo, a citizen of Mexico. R.M.G. was born in Lubbock County, Texas on December 4, 2002, and was days short of her first birthday at the time the events giving rise to this action occurred.

12. On December 1, 2003, Plaintiff Monica Castro went in person to the U.S. Border Patrol station in

Lubbock, Texas and informed U.S. Border Patrol Officer Manuel Sanchez that her common-law husband, Omar Gallardo, had taken their child, R.M.G.

13. Plaintiff Castro informed Officer Sanchez that Omar Gallardo was present in the United States illegally and asked if U.S. Customs and Border Inspection would deliver R.M.G., a U.S. citizen, to her if Omar Gallardo were apprehended.

14. At that time, Officer Sanchez presented Plaintiff Castro with copies of documents bearing Omar Gallardo's photograph that indicated he was wanted in connection with a homicide in Amarillo, Texas. Officer Sanchez asked Plaintiff Castro if she had any information regarding Mr. Gallardo's involvement in said homicide. Plaintiff Castro responded that she did not know Mr. Gallardo when he lived in Amarillo, had no knowledge or information about the homicide, and was there only to seek assistance in recovering her child.

15. Officer Sanchez informed Plaintiff Castro that Mr. Gallardo would have the right to take the child to the Border Patrol station with him if he were apprehended, but that Officer Sanchez would not allow Mr. Gallardo to take the child to Mexico if he were deported because Officer Sanchez knew of the child's U.S. citizenship status.

16. Relying on the representations made by Officer Sanchez, Plaintiff Castro informed Officer Sanchez where DHS could locate Mr. Gallardo.

17. Plaintiff Castro contacted Officer Sanchez the following day, December 2, 2003, to enquire as to

whether Mr. Gallardo had been detained and whether the United States had possession of her daughter. Officer Sanchez informed Plaintiff Castro that DHS would not detain Mr. Gallardo that day.

18. At approximately 7:30 a.m. on the morning of December 3, 2003, Plaintiff Castro observed DHS agents apprehending several people at her former residence, including Mr. Gallardo and Plaintiff R.M.G. When, later that same morning, Plaintiff Castro contacted Officer Sanchez to tell him she was coming to the Lubbock station to pick up her infant daughter, Officer Sanchez replied that he would not release the child and that Plaintiff R.M.G. would be deported to Mexico with her father.

19. Plaintiff Castro, along with her mother, Cendy Castro, then went in person to the Lubbock Border Patrol station and asked to speak with Officer Sanchez.

20. Plaintiff Castro again asked to have her infant daughter delivered to her, but was told repeatedly by Officer Sanchez that he would not deliver her child to her because Omar Gallardo said he did not want Officer Sanchez to do so.

21. During that time, two detectives, who Plaintiff Castro believes were from Amarillo, Texas, approached her. The detectives asked Plaintiff Castro questions regarding the Amarillo homicide with which Omar Gallardo was allegedly involved.

22. After informing them that she knew nothing of Mr. Gallardo's activities in Amarillo, she asked the detectives for assistance in obtaining possession of her daughter. The detectives replied that they had nothing

to do with deportation proceedings, and could not assist her.

23. Plaintiff Castro could hear her infant daughter crying and pleaded with Border Patrol officials to let her see her baby, but was not allowed to do so. Other Border Patrol officials, including Officer Sanchez's supervisor, were present but provided no assistance. Plaintiff does not have sufficient information to determine whether all DHS employees present were employees of CBP, ICE, or both.

24. Plaintiff Castro asked when her child would be deported, to which Border Patrol officials told her that Plaintiff R.M.G. would be boarded on a bus to Mexico by 3: 15 p.m. that same day.

25. Plaintiff Castro then left the Border Patrol station to work with an attorney to obtain emergency custody orders. When they arrived at the courthouse, the judge was not there. Her attorney called the Border Patrol station to enquire as to the status of the U.S. citizen child, and was informed that she had already been deported, less than 12 hours after being taken into custody by the Border Patrol.

26. Plaintiff Castro has not seen or heard of her infant daughter since December 3, 2003. The only information she has as to her daughter's whereabouts is that Plaintiff R.M.G. was deported to Ciudad Juarez, Chihuahua, Mexico.

27. On May 12, 2005, the 28th District Court of Nueces County, Texas, issued a Final Decree of Divorce in the *Matter of the Marriage of Monica Castro v. Omar Gallardo.* Pursuant to that decree, Plaintiff Castro is named Sole Managing Conservator

of the child, R.M.G., and Omar Gallardo has no right of access or possession to the child.

First Cause of Action:

Violation of the Fourth Amendment

28. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

29. The Fourth Amendment protects against unreasonable search and seizure. Defendant United States' detention of Plaintiff R.M.G. without due process violated her Fourth Amendment constitutional interest in remaining free from bodily seizure.

30. Detention of Plaintiff R.M.G. was not due to an act of wrongdoing that warranted detention, nor was detention based on an emergency. The United States did not and cannot show that seizure of the minor child was necessary to protect Plaintiff R.M.G.'s health, safety and welfare; indeed Defendant United States placed R.M.G. in imminent danger by deporting her with a man it knew was wanted in connection with a homicide.

31. Defendant United States intentionally, maliciously, and recklessly violated R.M.G.'s right to be free from unreasonable seizure guaranteed by the Fourth Amendment of the U.S. Constitution.

32. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

33. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for

which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.

Second Cause of Action:

Violation of Fifth Amendment Procedural Due Process

34. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

35. The Fifth Amendment to the U.S. Constitution protects citizens from deprivation of life, liberty or property without due process of law.

36. On December 3, 2003, Plaintiff Castro made a claim of citizenship to Defendant United States on behalf of her minor child, Plaintiff R.M.G. Despite that claim, and despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment.

37. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

38. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief in the form of assistance from Defendant United States in locating and returning Plaintiff R.M.G. to the physical custody of Plaintiff Castro.

Third Cause of Action:

Violation of Fifth Amendment Substantive Due Process

39. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

40. The Fifth Amendment to the U.S. Constitution protects citizens from deprivation of life, liberty or property without due process of law.

41. By wrongfully and unlawfully deporting Plaintiff R.M.G., Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' fundamental substantive due process right to family integrity and protection against unreasonable government intrusion into family relationships.

42. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

43. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.

Fourth Cause of Action:

Statutory Violation of 8 U.S.C. § 1101, *et seq.*

44. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

45. Title 8 of the U.S. Code sets forth the laws governing immigration and nationality.

46. No section of Title 8 provides authority for the United States to detain or remove a U.S. citizen.

47. By detaining and removing a U.S. citizen, Defendant United States acted in clear violation of well-settled statutory law.

48. Defendant United States has waived immunity to suit for declaratory relief for statutory violations. 5 U.S.C. § 702.

49. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro, and declaratory relief, in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G.

Fifth Cause of Action:

Federal Tort Claims Act –Negligence

54. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.[1]

55. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE, and therefore, under the authority of Defendant United States.

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[1] [The gap in numbering appears in the original document.]

56. Defendant United States owed a duty of care to Plaintiffs Castro and R.M.G., breached that duty, and Defendant United States' breach caused damage to Plaintiffs in that:

57. Defendants' wrongful acts, neglect, carelessness, unskillfulness, or default directly and proximately caused the wrongful deportation of a U.S. citizen minor child, which has separated mother and child since December 3, 2003.

58. Said actions and inactions of Defendant United States amount to grossly negligent conduct.

59. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

60. As a direct, probable, foreseeable, and proximate result of Defendant United States' negligent and unlawful conduct, Plaintiffs Monica Castro and R.M.G. suffered mental anguish and suffering, loss of companionship, and R.M.G. has suffered unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S. § 2671 *et seq.*

Sixth Cause of Action:

Federal Tort Claims Act – Intentional Infliction of Emotional Distress

61. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 24 of this complaint.

62. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE, and therefore, under the authority of Defendant United States of America.

63. The United States engaged in a pattern of extreme and outrageous conduct that caused Plaintiffs Castro and R.M.G. to suffer severe emotional distress, for which Plaintiffs seek relief from Defendant United States of America.

64. Officer Manuel Sanchez misled Plaintiff Castro regarding the return of her child, Plaintiff R.M.G., for the sole purpose of obtaining information regarding the location of an undocumented person present in the United States. Following Officer Sanchez's deception, Officer Sanchez and other officials of U.S. Customs and Border Protection engaged in additional outrageous conduct, including denying Plaintiff Castro the ability to see her infant child, even though the child could be heard crying, and deporting a U.S. citizen child less than 12 hours after taking her into custody, effectively foreclosing any ability for Plaintiff Castro to assert her rights as a parent of the minor child.

65. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

66. Defendant United States' extreme and outrageous conduct caused Plaintiffs Castro and R.M.G. to suffer mental and emotional anguish and

suffering, for which Plaintiffs seek monetary relief [ ] pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Seventh Cause of Action:

Federal Tort Claims Act – False Imprisonment

67. Plaintiffs repeat and reallege each allegation contained in paragraphs I through 27 of this complaint.

68. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of Defendant United States of America.

69. Defendant United States willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification.

70. From the moment Defendant United States knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child.

71. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

72. The United States' false imprisonment of the child caused Plaintiffs to suffer mental anguish and

suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Eighth Cause of Action:[2]

Federal Tort Claims Act – Abuse of Process

67. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 27 of this complaint.

68. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of the Defendant United States of America.

69. By wrongfully detaining and deporting Plaintiff R.M.G., Defendant United States made an illegal, improper or perverted use of the deportation process established under federal law.

70. Defendant had an ulterior motive or purpose in exercising such illegal, improper or perverted use of process and used the process to accomplish and end beyond the purview of the purpose.

71. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

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2 [The redundancy in paragraph numbering occurs in the original document; hence the Seventh and Eighth Cause of Action sections are each assigned ¶¶ 67 through 72.]

72. Defendant United States' abuse of process regarding the detention and deportation of the child caused Plaintiffs to suffer mental anguish and suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Ninth Cause of Action:

Federal Tort Claims Act – Assault

73. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 27 of this complaint.

74. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of Defendant United States of America.

75. Defendant United States' unlawful detention of Plaintiff R.M.G. placed her in fear of imminent bodily harm.

76. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

77. Defendant United States' abuse of process regarding the detention and deportation of the child caused Plaintiffs to suffer mental anguish and suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm,

for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff Monica Castro for herself and as Next Friend of R.M.G. prays that, upon final trial, this Court provide the following relief:

a. Award Plaintiff Monica Castro monetary damages in the amount of Two Million, Five Hundred Thousand dollars ($2,500,000.00) against Defendant United States of America for claims arising under the Federal Torts Claim Act;

b. Award Plaintiff R.M.G. monetary damages in the amount of Two Million, Five Hundred Thousand dollars ($2,500,000.00) against Defendant United States of America for claims arising under the Federal Torts Claim Act;

c. As injunctive relief, order Defendant United States to immediately take all necessary measures to locate Plaintiff R.M.G. until she is found; to communicate regularly with Plaintiff Castro regarding the status of Defendants' efforts to locate and return Plaintiff R.M.G. to her; to return Plaintiff R.M.G. to her mother, Plaintiff Monica Castro; and, to assume all costs related to locating and delivering Plaintiff R.M.G. to Plaintiff Castro;

d. As declaratory relief, declare invalid an statute, regulation, policy or other procedure

relied on by Defendant United States to detain and deport Plaintiff R.M.G.;

e. Award Plaintiffs' post-judgment interest, as permitted by law;

f. Award Plaintiffs costs of court, as permitted by law; and

g. Award Plaintiffs any other relief this Court may deem just and proper at law or in equity.

Respectfully submitted,

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APPENDIX E

28 USCS § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the

National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

APPENDIX F

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law

providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States

Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

DEC 3 - 2010

No. 10-309

In the Supreme Court of the United States

MONICA CASTRO, INDIVIDUALLY AND AS NEXT FRIEND OF R. M. G., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When Omar Gallardo, a Mexican national, was detained and returned to Mexico by the United States Border Patrol, federal officers allowed his infant daughter to remain in his care. The child's mother, Monica Castro, brought suit on behalf of herself and her daughter under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), 2671-2680, claiming that the Border Patrol officers' refusal to forcibly remove the infant from her father violated state tort law.

The question presented is whether petitioner's claim against the United States is barred by 28 U.S.C. 2680(a), which provides that the federal government's tort liability does not extend to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

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In the Supreme Court of the United States

No. 10-309

MONICA CASTRO, INDIVIDUALLY AND AS NEXT FRIEND OF R. M. G., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-18a) is reported at 608 F.3d 266. The panel opinion of the court of appeals (Pet. App. 19a-51a) is reported at 560 F.3d 381. The opinion and order of the district court (Pet. App. 52a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. The petition for a writ of certiorari was filed on August 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, creates a cause of

action against the United States for negligent or wrongful acts of federal employees within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The statute does not subject the United States to suit for constitutional claims or violations of federal law. *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994).

Liability under the FTCA is limited by several exceptions, including an exception for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). This discretionary function exception, which has been part of the FTCA since its enactment, serves "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (internal quotation marks omitted).

The FTCA also excludes most intentional torts—"[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"—from its waiver of sovereign immunity. 28 U.S.C. 2680(h). In 1974, Congress qualified that exception, providing that the FTCA does apply to claims for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" based on "acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.*

2. Petitioner, a United States citizen, and Omar Gallardo, a Mexican national, lived together in the Lubbock, Texas area, where petitioner gave birth to their daughter, R.M.G. Pet. App. 53a-54a. On November 29, 2003, shortly before R.M.G.'s first birthday, petitioner left Gallardo and their daughter following an argument. *Ibid.* Petitioner contacted Texas Child Protective Services (part of the Texas Department of Family and Protective Services), the county sheriff's department, and the local police department later that day to determine how to obtain custody of the child. *Id.* at 54a-55a.

All three agencies informed petitioner that she and Gallardo shared parental rights and that she would need to hire an attorney to seek a custody order. Pet. App. 55a, 68a. Child Protective Services suggested that petitioner fill out an application to obtain assistance in securing custody. *Id.* at 55a. Petitioner did not do so, stating that she did not wish to wait one to two days for the process to be completed. *Id.* at 55a-56a.

Instead, two days later, petitioner went to the local United States Border Patrol station to report Gallardo as an illegal alien. Pet. App. 56a. When petitioner asked a Border Patrol agent whether she could recover R.M.G. from Gallardo, the agent "informed [petitioner] that she needed to get a court order for temporary custody of R.M.G." *Ibid.*[1] The agent also suggested that if petitioner were present when Gallardo was apprehended, she could take custody of the child after the agents ques-

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[1] Specifically, the Border Patrol agent contacted the sheriff's department and was informed that "the best thing for [petitioner] to do was obtain a court order from a Judge ordering her husband to release the child to her." Record on Appeal 241-242, 862, 952 (ROA). Based on this conversation, the agent advised petitioner to obtain a court order for temporary custody of the child "as soon as possible." ROA 243, 952.

tioned everyone on site about their immigration status. *Id.* at 56a-57a. Petitioner did not seek a state custody order at that time, and declined to be present when the agents visited Gallardo. *Id.* at 57a, 68a-69a.

Acting on the information provided by petitioner, the Border Patrol apprehended Gallardo two days later, at approximately 7:00 in the morning. Pet. App. 57a; ROA 865. Gallardo had R.M.G. with him when he was taken into custody, and took her with him to the Border Patrol station. Pet. App. 57a. Petitioner observed the proceedings from a relative's home across the street, but did not make her presence known to the Border Patrol agents. *Ibid.*

Petitioner arrived at the Border Patrol station soon after, and requested that R.M.G. be taken from Gallardo and given to her. Pet. App. 57a. The Border Patrol informed Gallardo that petitioner had come to the station and had asked for their daughter; Gallardo responded that petitioner had abandoned him and their baby and that he did not want to give R.M.G. to petitioner. *Id.* at 57a-58a.

The Border Patrol agents contacted the Texas Department of Family and Protective Services to determine whether the state agency could resolve the custody dispute. Pet. App. 58a; ROA 249. State officials instructed the Border Patrol that "the father had the right to the child," and that, absent allegations of harm to the infant, the Department was "not in a position to take the child away from the parent that had physical custody" and would not become involved in the dispute. Pet. App. 58a; ROA 245-246, 249, 949, 953.

Gallardo admitted that he was in the United States illegally, and the Border Patrol prepared to return him to Mexico on the agency's daily transport, which was

scheduled to leave no later than 3:15 p.m. to ensure that it would arrive in Mexico at a reasonable hour. Pet. App 58a; ROA 249.

At approximately 1:30 p.m., petitioner retained an attorney to seek a temporary custody order for R.M.G. Pet. App. 58a. The attorney drafted the necessary paperwork and proceeded to the courthouse, but was unable to obtain a signed order before the transport departed. *Id.* at 58a-59a. Although the transport takes approximately seven hours to travel to Mexico, ROA 916, petitioner's attorney did not pursue the matter further after the transport departed. Pet. App. 59a; ROA 934. Gallardo was thus repatriated to Mexico accompanied by his daughter. Pet. App. 59a.

3. Petitioner brought suit against the United States on behalf of herself and R.M.G., seeking relief under the Fourth and Fifth Amendments, the FTCA, and the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 80a. Petitioner alleged that the Border Patrol had acted tortiously by allowing Gallardo to retain custody of his infant daughter while he was processed for removal and subsequently returned to Mexico. Petitioner asserted claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault, *id.* at 89a-95a, and sought damages of $2.5 million apiece for herself and R.M.G., *id.* at 95a.

The district court dismissed the suit, holding, *inter alia*, that petitioner's FTCA claims were barred by the discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 52a-79a. The court explained that the exception applies to discretionary conduct that is "the product of 'judgment or choice'" and "susceptible to policy analysis." *Id.* at 67a, 74a (citations omitted), and held that the

Border Patrol's actions met both of those criteria. The court noted that petitioner had been informed repeatedly by state and local agencies that she would need to obtain a court order before she would be entitled to take her daughter from Gallardo, and that petitioner had declined to do so. *Id.* at 68a. Instead, petitioner had waited two days before contacting the Border Patrol to report that Gallardo was an illegal alien. *Ibid.* When Gallardo was taken to the Border Patrol station two days later, "very early in the morning," petitioner had waited six hours before seeking a court order and then abandoned her efforts once Gallardo and R.M.G. were placed on the transport to Mexico. *Id.* at 69a-70a.

The district court explained that petitioner's "decision not to be present at the time of the arrest" and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico" presented the Border Patrol with "an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico." Pet. App. 70a, 73a. The court found "no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation," and held that the officers' actions were the product of judgment or choice. *Id.* at 71a. The court further held that the federal officers' decisions, involving the treatment of an infant child in possession of a foreign national under the Border Patrol's authority, were "unequivocally subject to policy analysis." *Id.* at 75a.

The court accordingly dismissed petitioner's FTCA claims for lack of jurisdiction. Pet. App. 76a.[2] The court dismissed the remainder of petitioner's claims as nonjusticiable, and entered judgment for the United States. *Id.* at 76a-79a.

4. A divided panel of the Fifth Circuit reversed. Pet. App. 19a-51a. The panel did not question that the conduct at issue was of the kind protected by the discretionary function exception. The majority noted, however, that the discretionary function exception does not apply when "a statute, regulation, or policy mandates a specific course of action." *Id.* at 28a (quoting *Garza* v. *United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005)). The majority reasoned that discretion would likewise be precluded in the face of alleged constitutional violations and that, in this case, petitioner's allegations were sufficiently "intertwined with * * * constitutional strands" to withstand dismissal. *Id.* at 35a, 38a. The panel accordingly remanded "for the district court to consider in the first instance to what extent the alleged constitutional violations are cognizable under [petitioner's] FTCA claims." *Id.* at 39a.

Judge Smith dissented. Pet. App. 40a-51a. The dissent noted that the FTCA does not waive the United States' sovereign immunity for alleged constitutional torts, which may be redressed by money damages only through suits against individual officers under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 42a-44a. The dissent

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[2] Petitioner did not contend in the district court that either her allegations of constitutional misconduct or 28 U.S.C. 2680(h)'s law enforcement proviso bore any relevance to whether the Border Patrol officers' actions were beyond the reach of the discretionary function exception, and the district court did not address those points.

argued that, in finding petitioner's generalized constitutional claims sufficient to overcome the discretionary function exception, the majority had "turn[ed] *Bivens* on its head" by providing that "the United States may be liable for conduct even where its officers cannot be," in instances where the conduct alleged was not clearly contrary to the Constitution. *Id.* at 44a. Judge Smith emphasized that the Border Patrol had not violated any constitutional provision, clear or otherwise: the agency had allowed the infant's parent to make decisions affecting her welfare, and in so doing had chosen the course "that least enmeshed the federal government in state custody issues" by "elect[ing] not to interfere with the *status quo* as R.M.G.'s parents had left it." *Id.* at 48a-49a; see *id.* at 47a.

5. The Fifth Circuit granted rehearing en banc on the United States' petition, vacated the panel's decision, and ultimately affirmed the district court's judgment. Pet. App. 2a-3a. Affirming "essentially for the reasons stated by the district court," the en banc court determined that under this Court's decision in *Gaubert*, petitioner's allegations fell within the discretionary function exception. *Ibid.* Specifically, the court held that the Border Patrol officers' elected course of action was "the product of a judgment or choice," "not mandated by any statute, regulation or policy," and "unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." *Id.* at 3a (quoting *id.* at 75a).

Judges DeMoss and Stewart dissented, concluding that the law enforcement proviso in 28 U.S.C. 2860(h) and petitioner's constitutional allegations precluded ap-

plication of the discretionary function exception, and that the Border Patrol's actions extended beyond the scope of authority granted by the INA. Pet. App. 4a-14a. Judge Dennis concurred in part and dissented in part, agreeing with Judges DeMoss and Stewart's conclusions that the law enforcement proviso prevented application of the discretionary function exception to petitioner's intentional tort claims, but noting that petitioner's false imprisonment allegations "clearly failed to state a claim on which relief can be granted" under applicable state law and that the same might be true of petitioner's remaining intentional tort claims. *Id.* at 16a-17a. With respect to petitioner's claims not covered by the law enforcement proviso, Judge Dennis concluded that no such violations had been alleged by petitioner and that reversal of the district court's judgment with respect to those claims was accordingly unwarranted. *Id.* at 17a-18a.

ARGUMENT

Petitioner contends (Pet. i, 15, 28) that certiorari is warranted to resolve a conflict among the circuits as to whether the discretionary function exception, 28 U.S.C. 2680(a), may apply in circumstances in which a plaintiff has generally alleged constitutional violations or intentional torts that fall within the law enforcement proviso of 28 U.S.C. 2680(h). Petitioner, however, did not properly raise either of those contentions below, and the en banc court of appeals did not address them. The court of appeals' decision is correct in any event. Further review is not warranted.

1. The Fifth Circuit's en banc decision addresses neither of the questions presented in the petition for a

writ of certiorari, and neither was properly preserved below.

a. Petitioner contends that the decision below "extends the [discretionary function] exception to conduct that exceeds an employee's statutory authority or violates the Constitution." Pet. 15. The court of appeals' five-paragraph per curiam opinion includes no discussion of that question. See Pet. App. 1a-3a. Instead, the court of appeals affirmed "essentially for the reasons given by the district court," *id.* at 3a, and the district court did not decide the question posited by petitioner either.

In the district court, petitioner did not argue that allegations of constitutional violations were sufficient to render the discretionary function exception inapplicable. See Pet. First Amended Resp. to Defendant's Rule 12(b)(1) Mot. to Dismiss for Lack of Subject Matter Jurisdiction & Mot. for Summ. Judgment 1-25 (Pet. Amended MTD Resp.). Instead, petitioner's "main argument [was] that in letting R.M.G. go with her father to Mexico, the Border Patrol Agents made an 'impermissible custody determination' in favor of Mr. Gallardo." Pet. App. 72a. She contended that this determination was *ultra vires* because the Border Patrol had no statutory "authority to decide that Gallardo's possession of R.M.G. bestowed on him greater parental rights." Pet. Amended MTD Resp. 17.

The district court did not reject this claim on the ground that the discretionary function exception covered "*ultra vires* conduct * * * that exceeds the scope of an employee's statutory * * * authority," Pet. 15, but instead on the ground that there was no such conduct in this case. Pet. App. 72a ("The Border Patrol did not actually make any 'custody determination' on De-

cember 3, 2003. The Border Patrol issued no custody order and made no determination that R.M.G. should remain permanently with either her mother or her father.").[3]

Subsequently, petitioner argued for the first time before the court of appeals that "because the challenged acts were unconstitutional, the discretionary function exception is inapplicable." Pet. C.A. Panel Br. 35 (capitalization altered). Notwithstanding petitioner's failure to make this argument before the district court, the court of appeals panel reached out to decide it. Pet. App. 35a, 38a. The en banc court chose not to do so, however, reviewing only matters actually decided by the district court and resolving them "essentially for the reasons given by the district court." *Id.* at 3a; see Gov't Supp. Br. 22 n.6 (pointing out to en banc court that petitioner "did not argue" in the district court "that any constitutional violation—clear or otherwise—could overcome the discretionary function exception").

It is thus not at all "astonishing[]" (Pet. 20 n.7) that a later panel of the court of appeals, citing the en banc decision in this case, said that "[t]his court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception." *Spotts* v. *United States*, 613 F.3d 559, 569 (5th

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[3] Similarly, petitioner contended in the district court that "federal law does not authorize federal immigration officials to detain or deport U.S. citizens," rendering the discretionary function exception inapplicable. Pet. Amended MTD Resp. 9 (capitalization altered). The district court rejected that contention on the ground that there was no detention or deportation of R.M.G. Pet. App. 71a-72a n.12.; see *id.* at 47a (Smith, J., dissenting) (R.M.G. "was not arrested, detained, held in custody, or deported—she was with *her father* and with *his consent*.").

Cir. 2010) (citing *Castro* v. *United States*, 608 F.3d 266 (5th Cir. 2010)). Indeed, in *Spotts*, just as here, the court of appeals found it unnecessary to decide that question because "[b]y failing to plead or otherwise argue to the district court that the alleged [constitutional] violation precluded the application of the discretionary function exception, the plaintiffs * * * waived this contention on appeal." *Ibid.*

b. In petitioner's second question presented, she contends that the decision below should be reviewed because it "align[s]" the Fifth Circuit "with the strongest version of the D.C. Circuit's position" on the meaning of the law enforcement proviso in 28 U.S.C. 2680(h). Pet. 33. There is, however, no mention of this question in the en banc court of appeals' decision. See Pet. App. 1a-3a. Nor did the district court—whose reasoning the en banc court adopted, *id.* at 3a—address the contention petitioner now makes that conduct that falls within the law enforcement proviso is categorically excluded from the discretionary function exception.

The absence of a decision on this question by the district court is not surprising because petitioner did not make an argument based on Section 2680(h) there. See Pet. Amended MTD Resp. 1-25. Indeed, petitioner did not make this argument before the court of appeals panel either. See Pet. C.A. Br. 11-49; see also *id.* at ix (no citations to 28 U.S.C. 2680(h) in Table of Authorities); Pet. App. 42a n.2 (Smith, J., dissenting) ("[Petitioner] does not allege that [Section] 2680(h) has any bearing on this case."). Petitioner advanced this contention for the first time before the en banc court. See Pet. Supp. C.A. Br. 7, 25. At that point, it was too late. See *United States* v. *Brace*, 145 F.3d 247, 261 (5th Cir.) (en banc) (en banc Fifth Circuit will not address claims "not

presented on appeal to the panel"), cert. denied, 525 U.S. 973 (1998).

c. Given that petitioner's questions presented were neither passed on below nor properly pressed, they provide no basis for this Court's review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

2. Even assuming *arguendo* that the court of appeals had implicitly resolved these questions without discussing them, its decision would be correct.

a. The discretionary function exception limits the FTCA's waiver of sovereign immunity, barring claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The exception prevents a plaintiff from testing "the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act * * * through the medium of a damage suit for tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 809-810 (1984) (citation omitted). The exception applies whenever a federal officer's action involves "an element of judgment or choice" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 322, 325 (1991) (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

There is no dispute among the circuits—or among the parties to this case—that when a federal officer acts contrary to a specific prescription in federal law, be it

constitutional, statutory, or regulatory, the discretionary function does not apply. This Court has explained that when a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow," the government has already exercised relevant policy discretion and there is no further discretion to exercise. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536) (emphasis added).

Petitioner misconstrues this analysis, however, in contending that conduct cannot fall within the discretionary function exception whenever it is alleged to be unconstitutional or otherwise contrary to law. Pet. 21-22. That contention is at odds with the repeated statements of this Court that the discretionary function exception applies unless a source of federal law "*specifically* prescribes" a course of conduct, and with the principles of official immunity that formed the backdrop to the FTCA and that were incorporated by Congress into the statute. The Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of official immunity thus applies to the exercise of "discretionary functions" even when conduct violated the Constitution, as long as the constitutional right was not defined with sufficient specificity that the official should have known the act was prohibited. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing *discretionary functions* * * * generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known.") (emphasis added).

The FTCA provided plaintiffs with a claim against the United States in place of claims against federal em-

ployees personally.[4] In enacting the FTCA, Congress did not set aside recognized principles of official immunity. See Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 545 (1947) ("The immunity thus retained is in accord with the generally accepted doctrine of the non-liability of public officers for acts involving the exercise of judgment and discretion."). Any doubt that might otherwise have existed on that score was removed by the inclusion of an explicit discretionary function exception. See *Varig Airlines*, 467 U.S. at 810 ("It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action."); see also *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) ("Congress very deliberately used the words 'discretionary function or duty' in the [e]xceptions to the Act with the intent that they should convey the same meaning traditionally accorded by the courts."); *Gray* v. *Bell*, 712 F.2d 490, 509 (D.C. Cir. 1983) ("[T]he discretionary function exception merely reflects a congressional belief that courts would continue to apply preexisting common law doctrine barring claims against discretionary governmental acts."), cert. denied, 465 U.S. 1100 (1984). Thus, when this Court in *Berkovitz* held that a federal mandate must

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[4] When the FTCA was originally enacted, plaintiffs could elect whether to pursue an FTCA suit against the United States or an action against an individual federal officer. In enacting the Westfall Act, Congress mandated the substitution of the United States as defendant for federal employees in claims arising out of acts in the scope of their employment. 28 U.S.C. 2679(d).

"specifically prescribe" conduct in order to overcome the discretionary function exception, it drew upon official immunity precedent, see 486 U.S. at 536 (citing *Westfall* v. *Erwin*, 484 U.S. 292, 296-297 (1988)), underscoring that the two standards are to be read in tandem.

The limit on discretionary functions described in *Berkovitz* and later cases is thus not triggered by every allegation of unlawful conduct, as petitioner contends, but only by a showing that discretion was cabined by a specific, mandatory directive—a point on which the courts of appeals are unanimous. See, *e.g.*, *Freeman* v. *United States*, 556 F.3d 326, 339 (5th Cir.) ("Statements made at this level of generality do not satisfy *Gaubert*'s and *Berkovitz*'s specific prescription requirement." (citing cases)), cert. denied, 130 S. Ct. 154 (2009); *Elder* v. *United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) ("The issue before us is whether the guidelines are sufficiently specific to remove decisionmaking under them from the discretionary function exception."); *Sutton* v. *Earles*, 26 F.3d 903, 909 (9th Cir. 1994) (same) (quoting *Berkovitz*, 486 U.S. at 544); *C.R.S. by D.B.S.* v. *United States*, 11 F.3d 791, 799 (8th Cir. 1993) (same) (citing *Berkovitz*, 486 U.S. at 536, 544); *Fazi* v. *United States*, 935 F.2d 535, 538 (2d Cir. 1991) (same); *Dube* v. *Pittsburgh Corning*, 870 F.2d 790, 794 (1st Cir. 1989) (same).

This requirement of specificity applies to constitutional, statutory, and regulatory limits alike. The exception's purpose, "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort," *Gaubert*, 499 U.S. at 323 (quotation marks omitted), is implicated in equal measure whether the mandatory duty alleged to remove an officer's conduct from the ambit of the discretionary function exception is based on a statute, regulation, or

constitutional provision. Indeed, petitioner acknowledges (Pet. 21) that the exception must be read to treat constitutional prescriptions in like fashion to statutory and regulatory ones.

A constitutional mandate, no less than a federal statutory or regulatory one, can eliminate an official's discretion when it is sufficiently specific or when an authoritative construction with sufficient specificity was clearly established before the officer acted. It does not follow, however, that the discretionary function exception can be overcome by any allegation of a constitutional violation, however vague.[5] The cases on which petitioner relies, although broadly worded, do not hold otherwise. Many do not involve unconstitutional conduct at all.[6] To the extent the remainder offer any analysis, they do not engage whether alleged violations of constitutional rights that were not clearly established are sufficient to

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[5] Such an approach would undermine not only the purpose of the discretionary function exception, but also the limits of qualified immunity that apply in *Bivens* actions against federal officials. Plaintiffs may recover under *Bivens* only if a constitutional violation was clearly established when the conduct took place. As Judge Smith's panel dissent explained, Pet. App. 44a, to allow a plaintiff to recover in an FTCA suit against the United States by alleging a violation of a constitutional right that was not clearly established at the time of the conduct at issue would accordingly "turn[] *Bivens* on its head," by providing that "the United States may be liable for conduct even where its officers cannot be."

[6] *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 122 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *K.W. Thompson Tool Co.* v. *United States*, 836 F.2d 721, 726-729 (1st Cir. 1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1196-1198 (D.C. Cir. 1986); *Pooler* v. *United States*, 787 F.2d 868, 871 (3d Cir. 1986), cert. denied, 479 U.S. 849 (1986); *In re Texas City Disaster Litig.*, 197 F.2d 771, 776-777 (5th Cir. 1952).

overcome the exception. See *Nurse* v. *United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor").

b. The federal agents' conduct in this case did not violate any constitutional, statutory, or regulatory mandate, let alone one that "specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322. As the district court explained, petitioner's choice "not to be present at the time of the arrest," and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico," presented the Border Patrol with the decision to "either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico." Pet. App. 70a, 73a. In making that decision, "the Border Patrol Agents' conduct * * * was not mandated by any statute, regulation or policy," *id.* at 3a, nor did the Constitution compel a particular result.

The INA vests the Secretary of Homeland Security and his designated agents with responsibility for "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1); 8 C.F.R. 2.1. The Act grants the Secretary the power and duty "to control and guard the boundaries and borders of the United States against the illegal entry of aliens," to "appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper," and to "perform such other acts as he deems necessary for carrying

out his authority under the provisions of this chapter." 8 U.S.C. 1103(a)(3) and (5).

Petitioner does not dispute that when federal agents took Omar Gallardo to the Border Patrol station, held him for processing, and returned him to Mexico, the officers did so pursuant to this authority under the INA. In so doing, the officers were also called upon to accommodate the infant child in Gallardo's care, a necessary incident to the authority conferred upon the officers by the Act and its accompanying regulations. See 8 U.S.C. 1103(5) (authorizing all "acts * * * deem[ed] necessary" for the carrying out of expressly granted duties). Petitioner points to no mandatory statutory or regulatory duty that dictated the officers' actions in such a circumstance; indeed, she acknowledged below that there was none, see Pet. App. 71a n.11 (district court noting petitioner's agreement that "there are no policies, rules or statutes that appl[ied]" in this situation).

Petitioner contends that Border Patrol agents generally lack the authority to "detain [U.S.] citizens," Pet. 23, but the officers' actions here did not contravene that principle. As Judge Smith's panel dissent emphasized, R.M.G. herself "was not arrested, detained, held in custody, or deported—she was with *her father* and with *his consent*." Pet. App. 47a. Gallardo's insistence that his daughter remain in his care does not transform the agents' acts into a "detention" or "deportation."[7]

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[7] Petitioner's reliance on a report by the Inspector General of the Department of Homeland Security is likewise misplaced, see Pet. 23-24, since no detention occurred here. Moreover, the policy cited by petitioner concerned operations by the Immigration and Customs Enforcement's Office of Detention and Removal Operations (now known as Enforcement and Removal Operations)—not those of the Border Patrol. The Border Patrol, whose mission entails short-term apprehension and

Petitioner's contentions regarding the Hague Convention on the Civil Aspects of International Child Abduction and the International Parental Kidnapping Crime Act of 1993, Pet. 26, are similarly without merit.[8] The Hague Convention, implemented by the International Child Abduction Remedies Act, does not regulate the Border Patrol's transportation of children in the custody of a parent, but rather provides a forum for civil actions in which parents may seek return of or access to children wrongfully removed from their home country. Oct. 25, 1980, 99 U.S.T. 11, 1343 U.N.T.S. 89; 42 U.S.C. 11601-11611; *Sealed Appellant* v. *Sealed Appellee*, 394 F.3d 338, 342-343 (5th Cir. 2004); see generally *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010) (Hague Convention "does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence"). The International Parental Kidnapping Crime Act of 1993 prohibits the removal of a child from the United States "with intent to obstruct the lawful exercise of parental rights,"

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prompt repatriation of foreign nationals, has no policy governing the temporary custody of United States citizens incident to proceedings against a foreign national. By comparison, the Office of Detention and Removal, which is responsible for holding individuals during potentially lengthy removal proceedings (for an average term of 30 days in 2008, see U.S. Immigration and Customs Enforcement, *Fact Sheet: Detention Mgmt.* (Nov. 20, 2008), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm), has implemented policies more narrowly prescribing the individuals who may be retained in federal facilities for such a lengthy period.

[8] These authorities were not raised before the district court or the panel, and the en banc court did not address them. See *Brace*, 145 F.3d at 261 (emphasizing that the en banc Court will not consider an argument "not presented on appeal to the panel"); see also Gov't Supp. Br. 25 (advising en banc court of appeals of the waiver).

18 U.S.C. 1204(a); petitioner offers no authority for the proposition that acquiescence to a parent's lawful assertion of custody violates the Act, nor any evidence in this case of an intent to obstruct parental rights.

Petitioner's alleged constitutional violations are of no greater substance. Petitioner asserts (Pet. 26-27) that the Border Patrol violated R.M.G.'s Fourth Amendment right to remain in the United States and be free from unreasonable seizures, as well as petitioner's Fifth Amendment due process right "to familial relationships." She cites no cases, however, to demonstrate that it was clearly established at the time of the officers' actions that their conduct under these circumstances was unconstitutional. Indeed, petitioner acknowledged before the district court that she "ha[d] not been able to identify any case that addresses a custody dispute over [a] U.S. citizen child who is either in federal immigration custody or deportation proceedings." Pet. Amended MTD Resp. 12.

Gallardo's expressed desire to keep his infant daughter with him, and his consent on her behalf, dispenses with the allegation that the Border Patrol's actions constituted an involuntary seizure or removal of his daughter from the United States in violation of the Fourth Amendment. Petitioner does not dispute that, as Judge Smith's panel dissent explained, "parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights." Pet. App. 46a n.6. Nor does petitioner suggest that the Border Patrol's actions were inconsistent with Texas custody law, or that petitioner possessed a superior right to determine where her daughter should remain during Gallardo's detention and subsequent removal to Mexico. Particularly in those circumstances, the Border Patrol's

determination not to upset the status quo of custody over R.M.G.—allowing the child to remain with her father rather than forcibly removing her to petitioner's possession, notwithstanding the absence of a court order so directing—cannot be characterized as an unlawful seizure of the child. At the very least, it is not clear how a reasonable agent could have known that this conduct would contravene a specific constitutional mandate. See *Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536.

Petitioner similarly fails to identify any substantive or procedural due process that petitioner and R.M.G. were entitled to yet not afforded. Petitioner suggests that R.M.G. could not be allowed to accompany Gallardo without some degree of procedure; but any process for determining whether petitioner had a superior claim to custody could be provided only by state authorities, as both the Border Patrol and state and local officials had explained to petitioner previously.[9] Texas authorities had likewise made clear how petitioner should proceed, but she declined to follow that course. Instead of pursuing state remedies, petitioner reported Gallardo's unlawful status to the Border Patrol. Having proceeded in this manner, petitioner cannot assert that the Border

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[9] Petitioner implies (Pet. 5) that the Border Patrol misled her and failed to inform her of the need to obtain a court order. But when petitioner first visited the Border Patrol, the agency contacted the local sheriff's department, was informed that "the best thing for [petitioner] to do was obtain a court order from a Judge ordering her husband to release the child to her," and advised petitioner to take such action "as soon as possible." ROA 242-43, 862, 952; Pet. App. 56a-57a. Even if there were a dispute over the agents' representations to petitioner concerning her need to act to maintain custody of R.M.G., any cause of action based on such statements would be barred by the FTCA's misrepresentation exception, 28 U.S.C. 2680(h).

Patrol failed to provide the process she could have obtained from state authorities.

Gallardo's expressed desire, as a parent, was to keep his daughter in his company. It is not contested that Gallardo asked for his daughter to remain with him at the Border Patrol station and to join him when he was taken to Mexico. Gallardo is concededly the child's father and had lawful custody of her. Especially in light of the respect for the parent-child relationship under the laws and traditions of this country, there was no apparent reason why Gallardo could not keep his daughter with him when he went to Mexico, whatever her citizenship status. The Border Patrol agents' refusal to upset the status quo and interfere with state custody matters does not offend any constitutional proscription, clear or otherwise.

3. Petitioner contends that the decision below (silently) misinterprets the relationship between the law enforcement proviso in 28 U.S.C. 2680(h) and the discretionary function exception. She notes (Pet. 28) that Section 2680(h) permits suit under the FTCA for certain intentional torts committed by law enforcement personnel, and contends that conduct falling within this proviso is categorically ineligible for the discretionary function exception. That issue is not properly presented in this case (see, pp. 12-13, *supra*), but, in any event, petitioner is mistaken.

Congress enacted Section 2680(h) "as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for *the same type of conduct* that is alleged to have occurred in *Bivens*." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (em-

phasis added). As noted above, defendants in *Bivens* actions are entitled to immunity when their actions do not violate clearly established constitutional proscriptions, and that same kind of immunity is incorporated into the discretionary function exception. See pp. 14-18, *supra*. Accordingly, the Congress that provided a counterpart to a *Bivens* action likewise would have intended the discretionary function exception to apply to that counterpart.

Petitioner does not explain why Congress, in creating a "counterpart" to *Bivens*, would have intended to subject the United States to broader liability than that of its individual employees. See *Carlson*, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."). The law enforcement proviso accordingly affords no greater waiver of sovereign immunity in the context of discretionary functions than Section 2680(a) already affords.

The decisions of the courts of appeals (see Pet. 29-34) do not meaningfully vary in this regard. As petitioner acknowledges, the decisions of the Fourth, Ninth, and D.C. Circuits are fully consistent with the result in this case. The Second and Seventh Circuits likewise contemplate that so long as an officer's function is truly discretionary, the law enforcement proviso will not preclude application of the discretionary function exception in Section 2680(a). See *Reynolds* v. *United States*, 549 F.3d 1108, 1113 (7th Cir. 2008) ("[A] federal investigator's decision to lie under oath is separable from the discretionary decision to prosecute."); *Caban* v. *United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (holding officers' acts nondiscretionary because "the activities are

not the kind that involve weighing important policy choices").[10]

While the Eleventh Circuit in *Nguyen* v. *United States*, 556 F.3d 1244, 1256-1257 (2009), has suggested that the law enforcement proviso is not limited by the discretionary function exception, it too has acknowledged that the "provision should be viewed as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Id.* at 1256 (internal citation omitted); see also *Denson* v. *United States*, 574 F.3d 1318, 1337 (11th Cir. 2009) ("As co-extensive causes of action, *Bivens* and FTCA claims necessarily arise from the same wrongful acts or omissions of a government official. By the same token, the same set of facts determines the theories available to the United States in defending the FTCA case."), cert. denied, 130 S. Ct. 3384 (2010). Where, as here, a plaintiff fails to establish any violation of a clearly established constitutional right, that plaintiff accordingly may not recover for discretionary acts even under the Eleventh Circuit's reading of the law enforcement proviso. *Ibid.* In any event, this case would be a poor vehicle to address any differences between the Eleventh Circuit and that of other courts of appeals, since the Fifth Circuit in this case did not address the question.

4. Finally, this case is a poor vehicle for review because of the weakness of petitioner's allegations that the

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[10] The Third Circuit has reserved judgment on the question. See *Pooler*, 787 F.2d at 872.

officers' conduct violated constitutional and state-law duties.

a. As discussed above (pp. 14-18, *supra*), petitioner's contention that the discretionary function exception is unavailable when a plaintiff alleges a constitutional violation fails because she does not point to any authority clearly establishing with the required level of specificity that what the officers did here violated the Fourth or Fifth Amendment. Indeed, petitioner's complaint failed to state any claim of a constitutional violation, whether or not clearly established. See pp. 21-23, *supra*; see also Pet. App. 17a (Dennis, J., concurring in the judgment in part and dissenting in part) ("The facts as alleged by [petitioner] do not disclose any constitutional or statutory violations."); *id.* at 47a (Smith, J., dissenting) (Gallardo's "explicit parental consent means that R.M.G.'s constitutional rights were not violated.").

b. Even if petitioner could overcome the discretionary function bar, it is doubtful that she has stated any valid state-law cause of action. Petitioner's amended complaint asserted claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. Pet. App. 89a-95a. It is difficult to fathom how the agents' decision (after consultation with the state child welfare agency) to permit R.M.G.'s natural father to remain accompanied by his infant child upon his return to Mexico could possibly give rise to any of the state law torts alleged by petitioner. See, *e.g.*, *id.* at 16a (Dennis, J., concurring in part and dissenting in part) (explaining that petitioner's false imprisonment claim fails under Texas law because "her father could and did consent on her behalf to her remaining with him"); *id.* at 15a ("It is not clear to me whether the [petitioner's] claims for abuse of process and assault can sur-

vive a Rule 12(b)(6) motion to dismiss."); *Allen* v. *State*, 253 S.W.3d 260, 261 (Tex. Crim. App. 2008) (consent constitutes a defense to assault); *Morgan* v. *City of Alvin*, 175 S.W.3d 408, 418 (Tex. Ct. App. 2004) ("The elements of assault are the same in both civil and criminal cases.").[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

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[11] Petitioner's claim for negligence, *i.e.*, that the agents negligently "caused the wrongful deportation of a U.S. citizen minor child," Pet. App. 90a, fails because R.M.G. was not deported. She went to Mexico in the custody of her father. See *id.* at 47a (Smith, J., dissenting). Petitioner's claim for intentional infliction of emotional distress fails because the agents' decision to permit R.M.G. to stay in the custody of her father does not satisfy that tort's requirement that the conduct be "extreme and outrageous," *i.e.*, "that which '[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Wornick Co.* v. *Casas*, 856 S.W.2d 732, 734 (Tex. 1993) (quoting Restatement (Second) of Torts § 46, cmt. d. (1965)) (brackets in original).

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IN THE

Supreme Court of the United States

MONICA CASTRO, for herself and as Next Friend of R.M.G.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

After a Fifth Circuit panel aligned itself with "a majority of other circuits," Pet. App. 32a, and held that the discretionary function exception of 28 U.S.C. § 2680(a) was overcome by plausible allegations that Border Patrol agents not only committed torts under Texas law but also acted unconstitutionally and *ultra vires*, Pet. App. 38a, the Government moved for rehearing en banc. It represented that the panel's holding presented a question "of exceptional importance." Pet. Reh'g i. It further argued that the Fifth Circuit had previously held that such allegations are insufficient. *See* Pet. Reh'g 9-10. The en banc court having cursorily adopted the Government's position over well-reasoned dissents, *see* Pet. App. 4a-18a, the Government tries to insulate its victory by claiming that the scope of Section 2680(a) was neither raised nor decided below and that there is no conflict among the circuits.

1. In making the claim that this case does not properly raise the questions presented, BIO 9-13, the Government distorts or ignores the record.

a. With respect to Section 2680(a) and *ultra vires* or unconstitutional conduct – the first question presented – the Government acknowledges that petitioners presented the issue to the court of appeals, both before the panel and en banc, BIO 11, but asserts that they failed to present it to the district court.

Not true. Petitioners' complaint alleged, with respect to each cause of action, that the Government was "not entitled to any defense" because its acts "were not discretionary functions." Pet. App. 90a,

91a, 92a, 93a, 94a. It also alleged violation of "R.M.G.'s right to be free from unreasonable seizure guaranteed by the Fourth Amendment," Pet. App. 86a, and "Plaintiffs' fundamental substantive due process right to family integrity and protection against unreasonable government intrusion into family relationships," Pet. App. 88a. Finally, it alleged that agents acted beyond their statutory authorization. Pet. App. 89a. In their response to the Government's motion to dismiss, petitioners explained the legal import of these allegations in the same terms they have continued to use before the court of appeals and this Court: "[C]ourts have 'not hesitated to conclude that [official] action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.'" Pl. Resp. 9 (citation omitted).

b. The Government's contention that petitioners failed to argue the relevance of the law enforcement proviso – the second question presented – is equally misplaced.

Petitioners' briefing before the district court invoked the Fifth Circuit's decision in *Sutton v. United States*, 819 F.2d 1289 (1987), as a roadmap for applying the FTCA to their case. Pl. Resp. 9. The central question in *Sutton*, as the opening sentence declared, was "the interplay" between Sections 2680(a) and (h). 819 F.2d at 1290. *Sutton* suggested that claims within Section 2680(h) would not be barred by Section 2680(a). *See* 819 F.2d at 1293-95. Petitioners' citation of *Sutton* adequately preserved the argument they advance here. The district court clearly understood that petitioners were invoking

Section 2680(h). *See* Pet. App. 65a n.9. That the court nonetheless applied the discretionary function exception to these causes of action is its mistake, not petitioners'.

Petitioners renewed their reliance on *Sutton* before the court of appeals. *See* Pl.'s C.A. Br. 18. And even the Government admits that petitioners squarely presented the question to the en banc court, BIO 12, which rejected that claim over two dissents. The Government's vehicle argument is thus meritless.

c. Finally, the Government paradoxically argues that the en banc majority's failure to offer any analysis to support its conclusions provides a reason to deny review. *See* BIO 9, 12-13.

This Court "reviews judgments, not opinions." *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). It often grants review in cases where cursory appellate decisions have swept important issues of federal law under the rug. *E.g.*, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2981 (2010); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007); *Strickler v. Greene*, 527 U.S. 263, 265-66 & n.1 (1999). Given the importance of the questions presented, this Court should not permit the Fifth Circuit to insulate its outlier approach to interpreting the FTCA.

2. This case implicates two important conflicts among the courts of appeals.

a. With respect to the second question presented, the Government does not contest that the courts of appeals are split on whether Section 2680(h) permits

certain claims to proceed regardless of the discretionary function exception. *See* Pet. 28-34; Br. Amici Curiae Nat'l Immigration Project *et al.* 7-8; BIO 24-25.

b. With respect to the first question presented – whether Section 2680(a) applies when employees exceed the scope of their statutory or constitutional authority – the Government claims that "[t]here is no dispute among the circuits." BIO 13. Would that it were so. But as the petition explains, although seven courts of appeals have held that the exception does not cover *ultra vires* or unconstitutional acts, the Fifth and Seventh Circuits have held that it does. Pet. 15-20; *see also* Br. Amici Curiae 6-7.

Nowhere does the Government acknowledge, let alone try to distinguish, the decisions petitioners cite adopting the minority position. It simply ignores them. The Government's failure to address *Santos v. United States*, 2006 U.S. App. LEXIS 10261 (5th Cir. 2006), is particularly egregious, given its express reliance on that case in its briefing before the en banc Fifth Circuit as the exemplar of that Circuit's rule that allegations of unconstitutional conduct do not overcome the discretionary function exception. *See* U.S. Pet. Reh'g 9-10; U.S. Supp. En Banc Br. 18.

The Government's denial of a conflict rests on two fundamental errors: it misunderstands the operative language in this Court's prior decisions; having done so, it misleadingly relies on court of appeals decisions having nothing to do with constitutional violations.

In *United States v. Gaubert*, 499 U.S. 315, 322 (1991), and *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), this Court stated that the discretionary

function exception is unavailable when a "federal statute, regulation, or policy specifically prescribes a course of action." The Government italicizes the phrase "specifically prescribes," BIO 14, and claims there must be a "specific prescription," BIO 13, to overcome the discretionary function exception.

But the Government's focus on *prescription* misses a key point. Congress does not specifically prescribe affirmative courses of action in areas that fall outside a federal actor's grant of authority. Pet. 22. Moreover, constitutional law – as opposed to the regulatory statutes at issue in *Gaubert* and *Berkovitz* – operates primarily through *proscription*. When constitutional law forbids conduct, there will be no "mandate" directing officers to take a "specific" course of action. Thus, even if a *prescription* must be specific to remove the "element of judgment or choice" that would otherwise require an agent to exercise discretion, *Berkovitz*, 486 U.S. at 536, a rule *prohibiting* action need not be similarly detailed.

For example, a regulation instructing federal employees to "move cargo eleven feet to the left" leaves no room for discretion, while one directing employees to "move cargo" requires choice and judgment. But a rule prohibiting the official from moving cargo at all need not also specify that he should not move the cargo to the left or to the right, eleven feet or one foot. Anything falling within the prohibition necessarily falls outside the "range of choice" available to the official. *See id.* at 538; Pet. 16.

Likewise, when the Constitution forbids immigration officials from detaining or removing a U.S. citizen, that general proscription is sufficient to

constrain the Border Patrol's "range of permissible courses" of action. *Gaubert*, 499 U.S. at 325. As this Court recently explained, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

The Government fails to recognize that the language it quotes from *Gaubert* and *Berkovitz* was directed not at constitutional proscriptions, but only at affirmative prescriptions. Accordingly, the Government cites a series of decisions by the courts of appeals addressing whether an affirmative regulatory mandate is sufficiently specific to eliminate the government's discretion. *See* BIO 16. But those cases have nothing to do with how the exception should be analyzed in the face of a constitutional prohibition.

3. The facts here squarely implicate the circuit splits. The Government does not dispute that if it held R.M.G. in immigration detention and was responsible for removing her from the country, then it exceeded its constitutional and statutory authority. Indeed, while this case was pending en banc, the Government asserted that "[k]nown U.S. citizens," including children, "are not placed in immigration detention." Pet. 24 (quoting a 2009 official report).[1]

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[1] The Government claims that this report is irrelevant because its discussion does not apply to the Border Patrol. BIO 19 n.7. The Government is wrong. The Report expressly refers to "staff from CBP's Office of Border Patrol" and states that "if CBP . . . identifies the child as a U.S. citizen, the child is released to the parent's designated custodian or to Child Protective Services." OIG Report 11.

See also Br. Amici Curiae 16-17 (discussing problems with the detention and removal of U.S. citizens); Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, States Without Nations (July 15, 2010) (same).[2] Outside the Fifth Circuit, the Government has settled such cases. *See, e.g.*, *Guzman v. United States*, Case No. CV08-01327 GHK (SSx) (C.D. Cal. May 4, 2010) (FTCA case involving mentally disabled citizen deported to Mexico and separated from his mother for 85 days); *Reyes v. Alcantar*, Case No. C07-2271-SBA (N.D. Cal. June 20, 2008) (FTCA claim of seven-year old citizen held, along with his non-citizen father, for approximately twelve hours).

Only by ignoring or misstating the allegations in petitioners' complaint can the Government argue that this case does not implicate the splits because it involves nothing more than a "determination not to upset the status quo of custody." BIO 22.[3]

a. The Border Patrol placed and kept R.M.G. in immigration detention, thereby exceeding both

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Moreover, petitioners only "acknowledged" that no policy covered the officers' actions, BIO 19, because the *Government* made that untrue representation before the district court. Pet. App. 71a n.11.

[2] Available at http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html.

[3] The Government's statement that "Gallardo is concededly the child's father and had lawful custody of her," BIO 23, is misleading. While Gallardo was R.M.G.'s father, petitioners have *never* conceded that he had "custody" of her as a matter of family law. *See* Pet. App. 72a.

statutory and constitutional authority. *See* Pet. 23-27. That it also seized and detained Gallardo does not undercut that conclusion. This Court has unanimously held that persons detained while accompanying the "motivating target" of a seizure – there, an automobile stop – are nevertheless "seized within the meaning of the Fourth Amendment." *Brendlin v. California*, 551 U.S. 249, 251, 261 (2007). Here, in the course of arresting Gallardo (during an armed immigration raid it ludicrously calls a "visit[]," BIO 4), the Government also removed R.M.G. from her home, transported her to a Border Patrol facility, and placed her in a locked, guarded immigration detention cell (part of the time without her father, R. 690:162). Tellingly, the Government never suggests that R.M.G. was free to leave. Instead, it depends on the fortuity that R.M.G. could neither walk nor talk (although she could, and did, cry for her mother, Pet. App. 85a) to avoid dealing with the fact she was seized.

The Government acknowledges that if Castro had accompanied agents on their raid, they would have given her R.M.G., BIO 3-4 – without regard to Gallardo's wishes – because R.M.G. was a citizen, Pet. App. 83a. Castro's reasonable refusal to accompany them in seeking a man wanted for questioning in a homicide, Pet. App. 57a,[4] changes nothing. At all relevant times, Border Patrol officials

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[4] The agent responsible for the raid conceded he had never before permitted a private citizen to accompany officers: Doing so is neither recommended by department policies nor advisable. *See* R. 686:141-42.

had the power to release R.M.G. to Castro but chose instead to keep the child in their physical control and to deny Castro contact with her child. When asked to distinguish between "handing the child over at the trailer and handing the child over at [the] border patrol station," Agent Sanchez responded that there was "probably no difference at all." Sanchez Dep. 178-79.

In any event, the Government's bland assertion that "parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights," BIO 21 (quoting Pet. App. 46a n.6), is beside the point, since Castro squarely asserted R.M.G.'s right not to be detained.

b. The Government is equally mistaken when it argues that Gallardo's willingness to have R.M.G. transported across the U.S. border somehow "dispenses" with the claim that it effected her removal. BIO 21. Without the Government's involvement, Gallardo could not have taken R.M.G. out of the country absent Castro's permission. Pet. 25-26. Both Mexican and U.S. law prohibited Gallardo from doing so on his own. Mexican law required any child traveling with one parent to present a notarized statement of consent from the other parent prior to entry. Manual de Trámites Migratorios del Instituto Nacional de Migración, Diario Oficial de la Federación [DO], 21 de Septiembre de 2000 (Mex.). Nor would the United States have issued a passport to R.M.G. without Castro's consent. *See* 22 C.F.R. § 51.27(b)(2) (2003). As petitioners have already explained, not only did the Government's active participation in Gallardo's removal of R.M.G. from the country violate federal

policy, but it also deprived Castro of her clearly established parental rights under the Fifth Amendment. Pet. 27-28. That Fifth Amendment violation does not depend on R.M.G.'s having first been detained.

c. Seeking to suggest that R.M.G. was never within its control and to deflect attention from its own actions, the Government suggests that Castro brought these tragic events upon herself. Not so. Leave aside that the two days between when Castro fled home and when she contacted the Border Patrol, BIO 3, were the Thanksgiving weekend. Petitioners alleged that Border Patrol agents told Castro they "would not allow Mr. Gallardo to take the child to Mexico if he were deported." Pet. App. 83a. Not until mid-morning on the day of the raid did the Government first inform Castro it "would not release the child and that Plaintiff R.M.G. would be deported" that day, Pet. App. 84a. Within a few hours of learning that the Government had reneged on its promises (without which Castro would never have informed agents where they could find Gallardo and R.M.G., *see* Pet. App. 83a), Castro obtained counsel. Pet. App. 85a. The Government's blame-the-victim strategy compounds the Border Patrol's wrongful behavior.

4. With respect to the merits, the Government renews the argument it made before the Fifth Circuit that if the discretionary function exception is defeated by claims of unconstitutionality at all, the exception should be overcome only in cases where the unconstitutionality of the Government's conduct is clearly established. In short, the Government asks this Court to incorporate into the FTCA the qualified

immunity defense available in *Bivens* actions. *See* BIO 24. That argument finds no support in the text of the FTCA or this Court's decisions and, in any event, cannot support the judgment in this case.

a. To be sure, an individual official in a *Bivens* action enjoys qualified immunity unless his conduct violated clearly established rights. BIO 14. But qualified immunity has never been available to the United States as a defense against liability for state-law torts under the FTCA. *See Carlson v. Green*, 446 U.S. 14, 21 & n.7 (1980); *Castro v. United States*, 34 F.3d 106, 111 (2d Cir. 1994) ("[U]nder the FTCA, the United States is not entitled to defend on the basis of any official immunity that its executive employees individually might possess.").

The justification for qualified immunity "loses its force" when an entity – "in contrast to [an] official" – faces liability. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980). For individuals, qualified immunity ensures that "the threat of *personal* monetary liability" does not distort "the decisionmaking process." *Id.* This "inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed." *Id.* at 656; *see also Butz v. Economou*, 438 U.S. 478, 497 (1978) (qualified immunity reduces the "danger that the threat of [personal] liability would deter [an officer's] willingness to execute his office") (internal citation omitted). Moreover, with respect to Section 2680(h), Congress clearly intended to permit cases to go forward regardless of whether there was *Bivens* liability. *See* Pet. 34-38.

b. Under the facts alleged in the complaint, there were "clearly established" constitutional violations.

Pet. 26-28. If nearly a century of unbroken precedent regarding treatment of U.S. citizens by immigration authorities and the substantive due process rights of parents does not clearly establish the law, it is difficult to imagine any case where unconstitutional conduct would overcome the discretionary function exception. Indeed, the Government itself has acknowledged that if Border Patrol agents "detained and arrested a known U.S. citizen," their actions would be "*clearly* outside their statutory authority." U.S. Br. 13, *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010) (emphasis added).

5. The district court dismissed petitioners' complaint on jurisdictional grounds, Pet. App. 53a, so – contrary to the Government's suggestions, BIO 26-27 – the viability of petitioners' state-law claims can and should be addressed on remand, rather than by this Court in the first instance. In any event, it is hardly "difficult to fathom," BIO 26, how a party who locked an infant away from her mother, disregarded the mother's attempts to keep the baby from being removed from the country, refused to assist the mother in finding her baby, and engaged in the other acts alleged here would be liable to both mother and child under Texas law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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MONICA CASTRO, FOR HERSELF AND AS NEXT FRIEND OF R.M.G.,

Petitioner,

v.

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BRIEF FOR AMICI CURIAE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND LEGAL SERVICES FOR CHILDREN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend individual rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on

immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project has participated as amicus curiae in several significant immigration-related cases before this Court.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild (NLG) to combat misconduct by police officers, prison guards and other law enforcement officers. The project presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

Legal Services for Children (LSC), founded in 1975, is one of the first non-profit law firms in the country dedicated to advancing the rights of youth. LSC provides direct legal and social services to children and engages in systemic reform litigation in the San Francisco Bay Area, representing clients in cases that include immigration, legal guardianship, dependency, school discipline. LSC has published several reports on the legal rights of children including *The Case for Reform: San Francisco's Immigrant Youth Policy, Juvenile Probation's Policy of Referring Youth to I.C.E. Without Due Process.*

LSC represents over 550 clients annually and provides consultation, legal advice and referrals to over 1,500 youth and concerned adults and has participated as amicus curiae in several significant cases involving the rights of children.

Amici have a substantial interest in the outcome of this case. [1] The Federal Tort Claims Act ("FTCA" or the "Act") provides compensation for victims of government negligence and abuse. All too often, those cases arise in the immigration and law enforcement contexts, like the case at issue here. They arise when American citizens are unlawfully detained or deported. They arise when people in immigration detention are mistreated or denied proper medical care. And they arise when immigration officials engage in unlawful home raids.

A robust and uniform Federal Tort Claims Act is essential both to compensating victims and to preventing future abuse. Policies at both the national and local levels are consistently affected by the risk of tort liability. The decision below restricts liability in a way that actually discourages local offices in the Fifth Circuit from setting rules and guidelines to ensure that Border Patrol agents and law enforcement officers correctly and fairly execute their tasks. If it is allowed to stand, many more than Monica Castro will have no remedy and no protection when

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date, and have consented to its filing.

they are subject to malfeasance by Border Patrol and other government agents. The Court should grant certiorari now and reverse the Fifth Circuit so that individuals, companies, and organizations can enjoy uniform protection everywhere in the country.

INTRODUCTION

The Fifth Circuit has confirmed its alignment with the Seventh Circuit in erroneously expanding the Federal Tort Claims Act's discretionary function exception to include any act that does not violate a specific statutory, regulatory, or policy mandate, and the time has come to end the nearly four-decade-old conflict in the circuits. The Seventh Circuit's ruling—without any analysis—that Constitutional violations are "discretionary" under the Act had sat alone while circuit after circuit disagreed. But now, the Fifth Circuit, which houses a large share of the United States' immigration detainees, has decided, en banc, to confirm its previously-unpublished agreement with the Seventh Circuit and hold that violations of state tort law are not compensable under the Act when they arise out of unconstitutional or *ultra vires* behavior by government agents.

As a result, 57 million people, and all of the businesses and other organizations residing and doing business within the Fifth and Seventh Circuits, have a vastly different Federal Tort Claims Act from the one enjoyed by most of the country. The discretionary function exception is now so all-encompassing in those circuits that the only conduct that escapes its reach is conduct that violates an express statutory, regulatory, or policy mandate. And the impact in the immigration realm will be significant.

Hundreds of thousands of people are apprehended each year in the United States for immigration enforcement reasons. Texas, which sits in the Fifth Circuit, has the United States' longest border with Mexico, and it is the source of numerous immigration cases. Most of these people proceed without counsel and rely on government agencies to perform their duties within the bounds of the Constitution and their statutory mandates. Beyond the immigration realm, the Act touches a panoply of government functions that affect individuals, businesses, and other organizations.

Thus, more than money is at stake here. The Federal Tort Claims Act provides an important deterrent to negligent and abusive behavior by government officials. When properly construed, it encourages agencies to adopt policies for the fair and ethical treatment of the people they encounter. Conversely, the Fifth and Seventh Circuits' interpretation of the Act creates an incentive for agencies to *avoid* providing specific mandates because those mandates are the only way to create exposure under the Act. No more litigation in the courts below will aid this Court's analysis. All but three circuits have ruled on the discretionary function exception's scope with respect to unconstitutional conduct, *ultra vires* conduct, or the law enforcement proviso. On an issue of such critical importance, those who are disadvantaged by the fact that they were injured in the wrong circuit should not have to wait any longer.

REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED WITHOUT DELAY.

1. This case involves two circuit splits that warrant resolution without delay. Disparate interpretations of the discretionary function exception's outer limits are a recurring problem that provide a large minority of Americans with a version of the Act that can be circumvented with little effort. Recently, the Fifth Circuit confirmed its agreement with the Seventh Circuit in holding that any conduct not mandated by statute, regulation, or policy—including conduct prohibited by the Constitution—is "discretionary" and exempt from liability under the Act. This holding directly conflicts with those of the First, Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits, which have held that the exception does not cover conduct that is *ultra vires* or unconstitutional. Pet. 16; Pet. App. 32a-33a (panel opinion citing cases). Additionally, the Fifth Circuit exacerbated the split on the applicability of the discretionary function exception to claims that fall within the law enforcement proviso. Pet. 33.

This divide is real and it has dangerous consequences for tens of millions of Americans. Castro's case reflects the troubling reality that the circuits apply significantly different legal standards under the same statute, which has unambiguous language. Presently, there are about 32 million people living in the Fifth Circuit, and about 25 million people in the Seventh Circuit. U.S. Census

Bureau, *2009 Population Estimates*.[2] For those 57 million people—about 18 percent of the total U.S. population—the Act's force has been weakened by the Fifth and Seventh Circuits' disregard for known restraints on governmental power. And that number does not account for the panoply of businesses and other entities who also must accept injury from the government by *ultra vires* acts or constitutional violations without any hope of compensation under otherwise-applicable state tort law, through the Act. *See, e.g.*, *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512 (8th Cir. 2001) (holding that the United States could be sued under the FTCA for negligence as a loan guarantor to a business).

The Act's interpretation is further splintered under the law enforcement proviso, which waives sovereign immunity for certain intentional torts otherwise excepted from the Act's coverage when based upon acts or omissions of law enforcement or investigatory officials. 28 U.S.C. § 2680(h). About 33 million people—Eleventh Circuit residents—benefit from the law enforcement proviso even when the discretionary function exception, which provides invaluable protection from law enforcement officers' misconduct, might otherwise apply. *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009); U.S. Census Bureau, *2009 Population Estimates*. Four years ago, the Court denied a petition for certiorari in *Welch* v. *United States*, 546 U.S. 1214 (2006), which similarly presented the question of whether a claim that is subject to the law enforcement proviso must also overcome the due care and discretionary function

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[2] http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2009_EST&-format=US-40S.

exceptions to the Act. *See* Petition for Certiorari, No. 05-529, 2005 WL 2777348 at *i. Since then, two additional circuits have weighed in, one on each side of the question, and the Fifth Circuit has reversed course. *See Reynolds* v. *United States*, 549 F.3d 1108, 1114 (7th Cir. 2008); *Ngyuen*, 556 F.3d at 1256-57; *compare Sutton* v. *United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) with *Castro* v. *United States*, Pet. App. 1a.

Claims under the Act involve injuries inflicted by the government through a wide array of means. But its protection means little if redress is not equally available to all. In *Nguyen*, 556 F.3d at 1247-48, a doctor fled to America from Vietnam after the communist takeover and a one-year prison term. After years of medical practice and becoming an American citizen, the doctor was arrested for unlawful distribution of controlled substances. As a result, the doctor's practice suffered. *Id.* at 1248. He was temporarily banned from prescribing drugs, health insurance companies canceled their contracts with him permanently, and he lost patients. *Id.*

The doctor sued the United States under the Act because the arrest "was not based on any evidence of wrongdoing at all." *Id.* In response to the doctor's false imprisonment and malicious prosecution claims, the government invoked the discretionary function exception, but the court rejected its application. *Id.* at 1260. In its opinion, the Eleventh Circuit noted how this story "illustrates the value of living in a country where a citizen may pursue claims against the government," *id.* at 1246, as opposed to his previous country, from which "he had no remedy but to flee" after being wrongly jailed, *id.* at 1249.

Fortunately for the doctor, he fled to Florida, in the Eleventh Circuit, rather than Texas, in the Fifth. But Monica Castro was unfortunate enough to have been in the Fifth Circuit when her daughter was sent to Mexico. And as this case establishes, a party injured in the Fifth or Seventh Circuits cannot receive any relief against the United States under state tort law when federal law enforcement act beyond their scope of authority, violate constitutional rights, or even commit intentional torts clearly actionable under the Act.

In most of the country, Monica Castro would have a fair opportunity for relief, and Border Patrol might think twice about detaining a known U.S. citizen and making decisions about child custody to save $200. Pet. 6 n.4. The people who are injured in the conflicting circuits benefit from an FTCA that offers a deterrent against unauthorized, unconstitutional conduct by government officials by properly asserting jurisdiction under the Act and allowing the injured party to seek compensation under state tort law.

These issues have percolated in the circuit courts for nearly forty years, and only the Sixth, Tenth, and Federal Circuits have not yet ruled on them in some way. Thus, the topics are ripe for this Court's analysis and waiting for holdings in yet undecided circuits would only further fracture the decisional landscape. This case presents an opportunity for this Court to establish a uniform interpretation of the Act's discretionary function exception so that all will receive equal protection against unconstitutional and *ultra vires* government intrusion. Between the discretionary function exception and the law enforcement proviso, there are myriad regimes applying the same statutory language. After four

decades of litigation spanning almost every circuit, the time has come to resolve these issues and make the Act that touches so many lives uniform for all.

2. By dismissing Castro's case, the Fifth Circuit necessarily decided that a constitutional violation or an *ultra vires* action is discretionary under the Act. But both the Fifth and Seventh Circuit interpretations of the discretionary function exception are premised on a clear misreading of the Act and this Court's precedents. For that reason, summary reversal may be appropriate.

The Act provides a basic sovereign immunity waiver for tortious conduct, 28 U.S.C. § 1346(b)(1), with some express exceptions, 28 U.S.C. § 2680. The discretionary function exception plainly states that a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function" is barred. At the margins, there is room for interpretation regarding what constitutes a "discretionary function." But this case does not involve disputed facts existing near the margin. The Fifth Circuit *categorically* included unconstitutional and *ultra vires* acts within the discretionary function exception. Of course, it is axiomatic that there is "no 'discretion' to violate the Constitution." *Owen* v. *Independence*, 445 U.S. 622, 649 (1980). And *ultra vires* conduct is by definition impermissible and thus non-discretionary, *Hollar* v. *Virgin Islands*, 857 F.2d 163, 168 (3d Cir. 1988), so the government cannot qualify for the exception when its conduct is *ultra vires* either. Thus, the Fifth Circuit's decision to dismiss Castro's claims contravenes this Court's precedents and the Act's plain language.

The en banc panel adopted the district court's reasoning, which relied on an unpublished Fifth

Circuit decision as its primary support for the position that the discretionary function exception protects conduct that violates the Constitution. Pet. App. 3a, 67a (citing *Garza* v. *United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005)). The *Garza* panel purported to rely on *United States* v. *Gaubert*, 499 U.S. 315 (1991), to find that if no "statute, regulation, or policy mandates a specific course of action," then "the governmental action is considered discretionary." 161 Fed. Appx. at 343. But the court plainly misread *Gaubert*. Nothing in *Gaubert* supports the position that only acts mandated by statute, regulation, or policy are non-discretionary. But the Fifth Circuit has taken the "expressio unius" canon of *statutory* construction to absurd lengths by applying it to case law and assuming that the Court meant to exclude constitutional and *ultra vires* torts when it stated that the discretionary function exception does not apply when a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322; Pet. App. 42a (dissent from panel opinion stating that "[t]he omission of 'Constitution' from the Court's explicit list of sources that can create a 'mandate' that nullifies the discretionary function exception should be dispositive here"). That the exception does not apply when there is a specific statute, regulation, or policy does not mean that those are the *only* circumstances it does not cover.

This Court did not need to apply the exception to unconstitutional conduct in *Gaubert*. 499 U.S. at 318. The complaint only alleged that certain government actors had performed their duties negligently, violating certain regulations. *Id.* And the Court held that the regulations specifically provided

discretion to the federal officers, which triggered the discretionary function exception. *Id.* at 332. Because the Court did not rule on an activity that was allegedly unconstitutional or outside the government agency's powers, *Gaubert* is no authority for the proposition that unconstitutional and *ultra vires* conduct is "discretionary" under the Act. *See Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787 n.4 (1996) (stating that a case was not authority on a matter not presented or addressed).

Indeed, when discussing the discretionary function exception's boundaries in the abstract, the Court noted in *Gaubert* that the exception only applies to conduct involving choice or, "judgment as to which of a range of *permissible* courses is the wisest." 499 U.S. at 325 (emphasis added). This comports with Congress' intent that the discretionary function exception was "intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an *authorized activity*." H.R. Rep. No. 79-1287, at 5 (1945). (emphasis added). Lacking binding authority interpreting the Act, the Fifth Circuit should have applied this Court's settled precedents on what is "discretionary" or "permissible" in other contexts. Then, it would have been compelled to conclude that the government does not have discretion to violate the Constitution or act outside the scope of its authority.

For its part, the Seventh Circuit did not offer any analysis supporting its statement that the government's "exercise of discretion, albeit constitutionally repugnant," was exempt from compensation under the Act. *Kiiskila* v. *United States*, 466 F.2d 626, 627-28 (7th Cir. 1972). The

decision (1) includes just one sentence claiming that unconstitutional acts can be protected under the discretionary function exception, (2) notes that the government's authority was "constitutionally limited," and then (3) fails to reconcile the constitutional limitation with its ruling that the government's conduct was discretionary. *Id.* Weighing the Fifth and Seventh Circuits' cursory analyses against the well-reasoned opinions of the myriad other circuits to rule on these issues, Pet 15-20, it is clear that unconstitutional and *ultra vires* actions are not "discretionary" and are not excepted from liability under the Act.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

A. The Act Is An Invaluable Asset To Prevent Mistreatment Of Immigration Detainees And Compensate Victims.

The Act plays an important role in compensating victims of governmental negligence and abuse. It also provides an important deterrent to government misconduct and a valuable incentive for agencies to develop strong policies that promote accountability and professional treatment of citizens. By placing the Act's scope in the hands of the very agencies it purportedly holds accountable, the Fifth and Seventh Circuits have limited the Act's deterrent function.

This Court has recognized that the Act was designed to provide redress to individuals with meritorious claims against the federal government when those claims would otherwise be barred by sovereign immunity. *United States* v. *Muniz*, 374 U.S. 150, 154 (1963). And its deterrent value is

evident in Congress's addition of the law enforcement proviso.

In 1973, in light of abusive and unconstitutional no-knock home raids by federal law enforcement officials, Congress amended the Act to include the law enforcement proviso, which provides individuals with a remedy against the federal government for the intentional torts of its law enforcement officers. S. Rep. No. 93-588, at 2790 (1973). It did so shortly after this Court held in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), that the Constitution provides a cause of action for violations by federal officials. *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). Congress intended that the Act and *Bivens* suits would provide "parallel, complementary causes of action" to aggrieved victims. *Id.* (*citing* S. Rep. No. 93-588, at 3 (1973)). Because some victims of torts committed by federal officials that also violate the Constitution may not have an available or adequate remedy under *Bivens*, the Act is at times the viable means of redress for them.[3] By carving out this additional exception to the federal government's

[3] The defense of qualified immunity, available to defendants in *Bivens* suits but not to the United States under the FTCA, often defeats plaintiffs' claims. *See, e.g.*, Peter H. Schuck, *Suing Government*, 98, 100 (Yale University Press 1983). Furthermore, the Court has refused to supply a *Bivens* remedy in several contexts. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367 (1983) (First Amendment claims by federal employees);*United States* v. *Stanley*, 483 U.S. 669 (1987) (injuries suffered by members of the military); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (due process actions for denial of Social Security benefits). And for some torts, *Bivens* claims are statutorily precluded even when they violate the Constitution. *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1851 (2010) (holding that the FTCA is the exclusive remedy for personal injury claims against a Public Health Service employee).

sovereign immunity, Congress sought to strengthen the Act's deterrent value.

The Act's purposes of providing deterrence and an adequate legal remedy for meritorious claims are thwarted when the United States is granted immunity from suit where law enforcement officials commit unconstitutional and otherwise unlawful acts. Such a broad interpretation of the discretionary function exception would have especially harmful consequences in the area of immigration enforcement, where hundreds of thousands of people are apprehended each year. *See* Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2009* (2010) ("*Enforcement Actions*").[4] This enforcement has come with concomitant constitutional violations relating to immigration enforcement activities. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 71 (Feb. 13, 2008) (statement of Rachel E. Rosenbloom, Human Rights Fellow and Supervising Att'y, Boston College Center for Human Rights and International Justice) ("Rosenbloom Statement").

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[4] http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf. The Department of Homeland Security, which includes U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) made 613,003 apprehensions in 2009, 91% of which were effectuated by CBP. *Enforcement Actions* at 3. ICE now operates the largest detention and supervised released system in the country. See Dora Schriro, *Immigration Detention Overview and Recommendations*, (2009) ("Schriro"), (www.ice.gov/doclib/091005_ice_ detention_report-final.pdf).

Immigration detainees are highly susceptible to government abuse. About 90% of immigration detainees and over half of all people in removal proceedings proceed without counsel.[5] U.S. Dept. of Justice, Executive Office for Immigration Review, *FY 2007 Statistical Yearbook* (2008).[6] Thus, the likelihood of constitutional error is enhanced, *see* Rosenbloom Statement at 75, and the need for a proper remedy and a proper deterrent is greater.

The problem of detention and deportation of U.S. Citizens is so widespread that citizens may even be detained and deported on a daily basis. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 42 (Feb. 13, 2008) (statement of Kara Hartzler, Florence Immigrant & Refugee Rights Project) ("Hartzler Statement"). Some data suggest that about 1% of immigration detainees are U.S. citizens and that .5% of those who are eventually deported are citizens as well. Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, States Without Nations (Jul. 15, 2010) (data to be published in __Va. J. Soc. Policy & L. __, forthcoming January, 2011).[7] That 1% amounts to over 300 U.S. citizens in DHS custody on a given day,

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[5] Unlike criminal proceedings, immigration proceedings do not entitle respondents to the right of counsel at government expense. 8 U.S.C. § 1362; *see* Rosenbloom Statement at 71. And in some proceedings, there is no right to counsel at all. *Id.*

[6] http://www.justice.gov/eoir/statspub/fy07syb.pdf

[7] http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html.

according to the DHS average daily immigration detention population statistics. Schriro at 2. Indeed, in 2007, a study determined that in just 13 out of the more than 300 immigration detention facilities, 322 detained individuals had citizenship claims. Nina Siulc et al., *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II*, Vera Institute of Justice, 38 n.45, 73, App. I (2008).[8] And unlawfully detained American citizens are sometimes locked away in immigration detention for years. See, e.g., *Flores-Torres* v. *Holder*, 680 F. Supp. 2d 1099, 1100 (N.D. Cal. 2009) (noting U.S. citizen detained for over three years in ICE custody); Hartzler Statement at 86 (noting that U.S. citizens detained sometimes for years before winning release).

The Act is a valuable means of redress for United States citizens who have been wrongfully deported and detained by immigration officials. United States citizens have a constitutional right against deportation by immigration authorities. *See Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). They also have a constitutional right to be free from detention by

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[8] http://www.vera.org/download?file=1778/LOP%2Bevalution_updated%2B5-20-08.pdf. A non-comprehensive study by the Associated Press of the problem of citizen deportation and detentions found that at least 55 United States citizens were deported or detained from 2001-2009. *See* Suzanne Gamboa, *AP Impact: Citizens Held as Illegal Immigrants*, The Monitor, Apr. 13, 2009, http://www.themonitor.com/articles/yet-25325-life-guzman.html. Others put the number of U.S. citizens detained by immigration authorities in the hundreds. Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, S.F. Chron., Jul. 27, 2009, (http://articles.sfgate.com/2009-07-27/news/17218849_1_judy-rabinovitz-immigration-laws-illegal-immigrant/2).

immigration officials. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). And the Act provides an effective remedy to those whose unconstitutional deportation or detention also violates state tort law. *See* Hendricks, *supra* (noting several settlements of FTCA and *Bivens* actions in cases brought by wrongfully deported and detained U.S. Citizens); *see also* Compl., Stip. Compromise Settlement, and Notice of Lodging in *Guzman* v. *Chertoff*, 2:08-cv-01327 GHK-SS (C.D. Cal. July 15, 2010) (settling for $350,000 FTCA claim of natural born and cognitively impaired U.S. citizen wrongfully deported to Mexico and lost there for three months). This protection can only be truly available where immigration officials do not have discretion to act in an unconstitutional manner.

Citizens and immigrants also have rights under the Fourth Amendment to be free from unlawful home raids by federal immigration officials. *I.N.S.* v. *Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984). Yet, in recent years, ICE investigations and enforcement have come to rely heavily on home raids. *See, e.g.*, Bess Chiu, et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, Cardozo Immigration Justice Clinic, at 5 (2009).[9] These raids have typically occurred at pre-dawn hours, without warrants, and often by forcible entry, with residents being seized without legal basis. *Id.* at 3. These home raids increase the likelihood that citizens and even citizen children will be unlawfully detained. *See, e.g.*, *Reyes* v. *Alcantar*, C07-2271 (SBA) (N.D. Cal.), Amended Complaint and Settlement Order

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[9] http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-report%20Updated.pdf.

(indicating FTCA and *Bivens* settlement for six-year-old U.S. citizen detained in a home raid); Stella Burch Elias, *'Good Reason to Believe': Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1129 (2008) (ICE home raids often result in arrests of "individuals categorized by ICE as 'collateral arrests'—individuals who happened to be present at the site of a[ICE] raid, and about whom, prior to their warrantless arrests, ICE typically held no information").[10]

ICE home raids are the contemporary equivalent to the no-knock home raids by federal drug agents that prompted Congress to amend the Act in 1974 to deprive the United States of immunity for the intentional torts of its law enforcement officers. *See* S. Rep. No. 93-588, *supra* at 2790. Fortunately, that amendment allows state tort law to provide redress to victims of such invasions—but only in jurisdictions in which federal law enforcement officials are not given discretion to violate the Constitution. *See Rodriguez* v. *United States*, 542 F.3d 704, 708 (9th Cir. 2008) (noting district court's FTCA judgment in favor of family whose home was unlawfully invaded by immigration officials); *Rhoden* v. *Dep't of Justice*, 121 F.3d 716, 716 (9th Cir. 1997) (unpublished disposition noting FTCA judgment for wrongfully detained lawful permanent resident).

The Act is similarly an important means of redress for immigration detainees who experience unlawful conditions of confinement. The right against

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[10] http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-lawsuits.

conditions of confinement that are so lacking that they constitute punishment is derived from the Fifth Amendment and is at least as extensive as rights protecting pre-trial detainees. *See Edwards* v. *Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (immigrant detainees are entitled to same level of constitutional protection as pre-trial detainees); *Jones* v. *Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding civil detainees entitled to greater constitutional protection than convicted prisoners and pre-trial detainees).

Hui v. *Castaneda*, 130 S. Ct 1845 (2010), illustrates the need for a robust Act to address unlawful detention conditions. For over ten months, Castaneda, while detained by ICE, sought treatment for a painful lesion on his penis. *Id.* at 1849. Although a biopsy was recommended several times to rule out cancer, federal officials denied the procedure as elective. *Id.* Instead he was treated with ibuprofen and antibiotics, and he was given extra boxer shorts. *Id.* After his release from custody, he promptly sought treatment, but because his cancer had metastasized, he died. *Id.* This Court held that Castaneda's *Bivens* claims were statutorily precluded and that the Act was his exclusive remedy. *Id.* at 1854.

Castaneda is not alone—stories of improper treatment in medical facilities abound. For instance, Boubacar Bah fell in a New Jersey immigration detention center injuring his head. Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times, May 5, 2008, at A1. Instead of providing prompt medical care, immigration officials shackled him, pinned him to the floor and left him in solitary confinement for thirteen hours. *Id.* He was finally

taken to a hospital where he received surgery for a skull fracture and brain hemorrhages that left him comatose for several months until he died. *Id.* Jason Ng, a detainee in Rhode Island complained for months about excessive pain. *Lin Li Qu* v. *Central Falls Detention Facility Corp.*, __ F. Supp. 2d __, No. 09-53 S, 2010 WL 2380739 at *1 (D.R.I. June 14, 2010). Medical and security staff accused him of faking illness and denied him treatment. *Id.* at *2. He was finally diagnosed with liver cancer and a broken spine, only a week before his death. *Id.* All too often, medical care provided to detainees has failed to pass constitutional muster, and a robust Act is a necessary deterrent. *See, e.g.*, *Lijadu* v. *I.N.S.*, No. 06-1508, 2009 WL 508040 (W.D. La. Feb. 26, 2009) (finding medical care unconstitutionally deficient where detainee waited eight weeks for treatment of his fractured arm, eight months for a refill for ulcerative colitis medication, sixteen months for clinical exams for his HIV and ulcerative colitis and fifteen months for repair of broken dentures).

Unconstitutional detention conditions are not limited to adult detainees. In 2007, DHS settled several cases brought by detained children ages 3-16 who were deprived of adequate medical, mental health and dental care, as well as educational opportunities. *See* Settlement Agreement, *In re Hutto Family Detention Center*, No. A-07-164-SS (W.D. Tex. Aug. 26, 2007).[11] The children were housed in highly restrictive settings and who were harshly disciplined by guards who threatened to permanently separate them from their parents. *Id.*, *see also* Nina Bernstein, *U.S. to Reform Policy on*

[11] http://www.utexas.edu/law/clinics/immigration/Hutto_settlement.pdf.

Detention for Immigrants, N.Y. Times, August 5, 2009, at A1.

In these cases, the Act serves dual roles. It compensates victims, and it provides a necessary deterrent against future malfeasance. In that respect, the Act "represents a landmark in governmental acceptance of responsibility and efforts to reduce injustice." William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 Am. Pol. Sci. Rev. 335, 337 (2002).

In its deterrent role, the Act provides a valuable incentive to agencies to develop strong policies that promote accountability and professional treatment of citizens. *See* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 U.C.L.A. L. Rev. 871, 886 (1991). Tort laws are premised in part on the fact that potential liability will affect the behavior of potential tortfeasors. Restatement (Second) of Torts § 901 cmt. C (1979) ("unlike the law of contracts or of restitution, the law of tort * * * has within it elements of punishment or deterrence"). The risk of liability provides an incentive to avoid tortious behavior. *See Dobson* v. *Camden*, 705 F.2d 759, 770 (5th Cir. 1983) ("[D]eterrence is concerned with establishing a rule to shape future conduct. A potential tortfeasor's actions will probably not be shaped by considerations of whether the injured party will be compensated nearly as much as they will be shaped by considerations of whether the tortfeasor will have to pay").

The Fifth Circuit's decision here undermines the Act's deterrent function by allowing liability only when the government has mandated a specific course

of conduct and the agent has violated it. Pet. App. 3a, 67a (upholding district court reasoning that the first prong of the discretionary function exception is not satisfied only if a "statute, regulation or policy mandates a specific course of action"). Under that view of the Act, the Fifth and Seventh Circuits have created a disincentive for local bureaus to lay out specific procedures because that would inherently subject an agency to greater liability. And the likely outcome is that there will be a host of Fifth and Seventh Circuit Border Patrol agents, Customs officials, and other law enforcement officers with less local guidance than agents in other regions.

But the indifference that Border Patrol displayed in this case needs an adequate deterrent. And local supervisors need an incentive to develop reasonable policies tailored to the local area that will aid in fair law enforcement.

B. A Clear Scope For The FTCA Is Valuable Beyond The Immigration Context.

A large number of claims under the Act relate to immigration and detention issues, but claims filed under the Act span an array of subject matters. And all of the deterrent and compensation concerns that make a robust and uniform Act important in the immigration realm also apply along the gamut of issues arising under the Act. The Act is designed to protect rights, property and safety against tortious action by government agents. *Mass. Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 139 (1956) ("[t]he central purpose of the original Act was to allow recovery against the United States on the basis and to the extent of recoveries for like torts committed by private tortfeasors"). The Fifth and Seventh Circuits' interpretations of the discretionary function

exception, however, have rendered the Act toothless in cases where agencies do not self-regulate and the courts thereby have diminished agencies incentive to do so.

When properly applied by the courts, the Act provides a remedy for a broad range of tortious injuries to individuals, businesses, and other organizations. In the business context, the Act can provide recourse for businesses injured by government action ranging from negligent failure to inspect grain warehouses, *Appley Bros.* v. *United States*, 164 F.3d 1164, 1175 (8th Cir. 1999), to malicious prosecution arising out of a dispute over importation of medical supplies, *Tri-State Hosp. Supply Corp* v. *United States*, 142 F. Supp. 2d 93, 101 (D.D.C. 2001).

For instance, in *Jerome Stevens Pharmaceuticals, Inc.* v. *FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005), the FDA posted trade secrets and other confidential information regarding a new drug on its website. The drugmaker sued the FDA under the Act for misappropriation of trade secrets and breach of a confidential relationship. *Id.* The district court dismissed the claims under the discretionary function exception. *Id.* at 1252. But the D.C. Circuit reversed, noting that the discretionary function exception did not apply to claims arising out of the disclosure of JSP's trade secrets by the FDA because federal laws prohibit it. *Id.* at 1252, 1258.

The Act further provides protection for a broad array of individual issues that do not relate to immigration or detention. For instance, In *Melton* v. *United States*, 488 F. Supp. 1066, 1068-70 (D.D.C. 1980), the government had undertaken to rehabilitate an individual's property but had

negligently hired contractors and supervised workers who left the rehabilitation incomplete and left the property abandoned and vandalized. The property owner won restoration damages for her property loss under the Act because the government had undertaken a duty to restore the property, and then its negligence caused the damage. *Id.* at 1075. *See also Oberson* v. *U.S. Dept. of Agric.*, 514 F.3d 989 (9th Cir. 2008) (government liability where the U.S. Forest Service posted speed limits along a trail, thereby creating a duty of care toward travelers, but failed to adequately warn of the danger of a steep drop on the trail), *Blessing* v. *United States*, 447 F. Supp. 1160, 1200 (E.D. Pa. 1978) (denying motion to dismiss claims under the Act brought by workers who suffered injuries caused by negligent safety inspections by the government).

Additionally, the Act provides protection against government abuses arising out of citizens' exercise of constitutional rights. Indeed, actions by government officials related to people's exercise of First Amendment rights often result in false arrest, malicious prosecution, or other claims that may not be actionable under the Fifth Circuit's overbroad view of the discretionary function exception. See, e.g., *Galvin* v. *Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (refusing to apply discretionary function exception to false arrest claim based on unconstitutional dispersal of prayer service), *Bergman* v. *United States*, 844 F.2d 353, 354 (6th Cir. 1988) (noting successful FTCA claim when FBI failed to take steps to protect civil rights protesters).

As a statute that spans all of tort law, the Act provides important protections over a broad array of potential claims. For 57 million people in the Fifth

and Seventh Circuits, along with myriad businesses and organizations that reside or do business there as well, the Act does not provide compensation when an agency acts unconstitutionally or outside of its authority. Moreover, the Fifth and Seventh Circuits' interpretation deters agencies from setting rules, rather than deterring agents from breaking them. The time has come to provide uniform application of the Act throughout the country, and allow people in the Fifth and Seventh Circuits to enjoy the fair application of the Act that Congress intended.

CONCLUSION

For these reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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